Supreme Court, U.S.
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No. 96-

In the Supreme Court of the United States

OCTOBER TERM, 1996

HAROLD D. JOHNSON, M.D.,
PETITIONER,

v.

GREATER SOUTHEAST COMMUNITY HOSPITAL CORPORATION, *et al.*,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in an antitrust lawsuit by a physician alleging misuse of a hospital peer review process to exclude him from its integrated delivery system, the Health Care Quality Improvement Act of 1986, 42 U.S.C. §§ 11101-11152, alters the burden of proof established in Rule 301 of the Federal Rules of Evidence, as interpreted by this Court in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

TABLE OF CONTENTS

Opinions below 1

Jurisdiction 1

Statutory provisions and rules involved 1

Statement 4

Reasons for granting the petition 16

Conclusion 24

TABLE OF AUTHORITIES

Federal cases:

Alexander v. Rush N. Shore Medical Ctr.,
101 F.3d 487 (7th Cir. 1996) 17

Anderson v. Liberty Lobby,
477 U.S. 242 (1986) 16, 21

Austin v. McNamara,
979 F.2d 728 (9th Cir. 1992) 22

Beverly v. Diggs,
591 F. Supp. 1321 (S.D.N.Y. 1984) 17

Brader v. Allegheny General Hosp.,
64 F.3d 869 (3d Cir. 1995) 19

Brown v. Presbyterian Healthcare Service,
101 F.3d 1324 (10th Cir. 1996) 21

Bryan v. James E. Holmes Regional Medical Ctr.,
33 F.3d 1318 (11th Cir. 1994), *cert. denied*,
115 S. Ct. 1363 (1995) 17, 21

Celotex Corp. v. Catrett,
477 U.S. 317 (1986) 21

Decker v. IHC Hospitals Inc.,
982 F.2d 433 (9th Cir. 1992), *cert. denied*,
113 S. Ct. 3041 (1993) 17

First National Bank of Arizona v. Cities Service Co.,
391 U.S. 253 (1968) 21

Fobbs v. Holy Cross Health System Corp.,
789 F. Supp. 1054 (E.D. Cal. 1992), *aff'd*,
29 F.3d 1439 (9th Cir. 1994), *cert. denied*,
1995 U.S. LEXIS 757 (1995) 22

Gomez v. Toledo,
446 U.S. 635 (1980) 19

Imperial v. Suburban Hosp. Ass'n, Inc.,
37 F.3d 1026 (4th Cir. 1994) 17

In re Winship,
397 U.S. 358 (1970) 20

Johnson v. Greater Southeast Community Hosp.,
951 F.2d 1268 (D.C. Cir. 1991) 1, 5

Johnson v. Greater Southeast Community Hosp.
1996 U.S. Dist. LEXIS 9532 (D.D.C. June 24, 1996) .. 1

Johnson v. Greater Southeast Community Hosp.
903 F. Supp. 140 (D.D.C. 1995) 1

Manion v. Lima Memorial Hosp.,
986 F.2d 1036 (6th Cir. 1992), *cert. denied*,
114 S. Ct. 71 (1993) 17

Matthews v. Lancaster General Hosp.,
87 F.3d 624 (3d Cir. 1996) 22

Pamintuan v. Nanticoke Memorial Hosp.,
1997 U.S. Dist. LEXIS 3300 (D. Del.
February 24, 1997) 18

Saint Mary's Honor Ctr. v. Hicks,
509 U.S. 502 (1993) 16, 18

Smith v. Ricks,
798 F. Supp. 605 (N.D. Cal. 1992), *aff'd*,
31 F.3d 1478 (9th Cir. 1994), *cert. denied*,
1996 U.S. LEXIS 2275 ..... 18, 23

State cases:

State Commission on Human Relations v.
Suburban Hosp., Inc.,
686 A.2d 706 (Md. App. 1996) 17

Federal statutes:

Clayton Act,
15 U.S.C. §§ 13 , 26 1

Civil Rights Act of 1964,
42 U.S.C. § 2000(e) 2, 15, 17

Civil Rights Acts,
42 U.S.C. 1981 2
42 U.S.C. § 1981 15
42 U.S.C. § 1983 19

Health Care Quality Improvement Act of 1986,
42 U.S.C. §§ 1101-11152
42 U.S.C. § 11111(a) 1, 2, 5, 19
42 U.S.C. § 11112(a) 2, 20
42 U.S.C. §1112(b)(3)(c)(iv) 23

Judicial Procedure
28 U.S.C. § 1254(1) 1
28 U.S.C. § 1331 1
28 U.S.C. § 1337 1
28 U.S.C. § 1343 1

Rules:

Federal Rules of Evidence
Rule 301 ..... 4, 5, 16, 19, 21

Federal Rules of Civil Procedure
Rule 56 ..... 4, 16

Miscellaneous:

H. Rep. No. 903, 99th Cong., 2d Sess. 9, 10, 11,
reprinted in, 1986 U.S.C.C.A.N. 6392,
6393 ..... 20, 22

Stuart Auerbach, *Johns Hopkins, Suburban Hospital Forms Partnership; Alliance Gives Baltimore Facility a D.C. Presence*, *WASHINGTON POST*, July 25, 1996 17

Douglas E. Goldstein, ALLIANCES: STRATEGIES FOR BUILDING INTEGRATED DELIVERY SYSTEMS (1995) 9

Stephen K. Cooper, *Hopkins HMO Ties to Greater Southeast*, *WASHINGTON TIMES*, July 7, 1989 7

Spencer Rich, *U.S. Hospitals Aren't Waiting for Congress*, *WASHINGTON POST*, June 21, 1994 18

OPINIONS BELOW

The district court issued two opinions in this case. The first opinion of the United States District Court for the District of Columbia (App. 28a-60a) is reported at 903 F. Supp. 140 (D.D.C. 1995). The second opinion of the United States District Court for the District of Columbia (App. 7a-27a) is reported at 1996 U.S. Dist. LEXIS 9532 (D.D.C. June 24, 1996). The order of the United States Court of Appeals for the District of Columbia Circuit summarily affirming the grant of summary judgment in this case (App. 1a-2a) is unreported. The opinion of the district court denying the respondents' request for attorneys' fees (App. 82a-86a) is unreported. The prior opinion of the United States Court of Appeals for the District of Columbia Circuit (App. 63a-81a) is reported at 951 F.2d 1268 (D.C. Cir. 1991).

JURISDICTION

The jurisdiction of the district court was invoked pursuant to 28 U.S.C. §§ 1331, 1337, 1343, and 15 U.S.C. §§ 13, 26. The court of appeals entered its judgment on October 9, 1996. App. 2a. The court of appeals denied petitioner's timely petition for panel rehearing and a suggestion for rehearing *in banc* in unreported orders dated January 31, 1997. App. 3a-4a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

Section 411(a) of the Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11111(a), provides

> (1) LIMITATION ON DAMAGES FOR PROFESSIONAL REVIEW AC-

> TIONS. If a professional review action . . . meets all the standards specified in section 412(a) . .
>
> (A) the professional review body,
>
> (B) any person acting as a member or staff to the body,
>
> * * *
>
> (D) any person who participates with or assists a body with respect to the action,
>
> shall not be liable in damages under any law of the United States . . . with respect to the action . . . [t]he preceding sentence shall not apply to damages under any law of the United States . . . relating to the civil rights of any person or persons, including the Civil Rights Act of 1964, 42 U.S.C. 2000e, *et seq.* and the Civil Rights Acts, 42 U.S.C. 1981, *et seq.*

Section 412(a) of the Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11112(a), provides

> IN GENERAL. For purposes of the protection set forth in section

411(a), a professional review action must be taken

> (1) in the reasonable belief that the action was in the furtherance of quality health care,
> (2) after a reasonable effort to obtain the facts of the matter,
> (3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair under the circumstances, and
> (4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3).

A professional review action shall be presumed to have met the preceding standards necessary for the protection set out in section 411(a) unless the presumption is rebutted by a preponderance of the evidence.

Rule 301 of the Federal Rules of Evidence provides

> In all civil actions and proceeding not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

Rule 56(c) of the Federal Rules of Civil Procedure provides

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

STATEMENT

This case concerns a physician who initiated a lawsuit in 1990 seeking declaratory and injunctive relief as well as money damages against a hospital on antitrust and civil rights grounds

for misusing its peer review process to terminate his medical staff admitting privileges. The physician claims that the hospital terminated his privileges and excluded him from its affiliated hospital-based managed care plans so as to funnel his then-500 yearly Medicaid admissions to its newly-developed Medicaid managed care plan. He alleges a continuum of anti-competitive and discriminatory activity including, termination and non-renewal of his privileges, removal from the hospital's "call" schedule for indigent patients, interference with his reappointment to the staff at another hospital, and interference with his membership in the hospital-based managed care affiliates. In 1991, the court of appeals reversed a district court finding that the physician's claims were not ripe for consideration and remanded the case for trial on the merits. *Johnson v. Greater Southeast Community Hosp.*, 951 F.2d 1268 (D.C. Cir. 1991). App. 63a-81a.

1. The Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11111(a) (HCQIA), casts a presumption of reasonable initial action by a defendant-hospital that may be overcome by a preponderance of the evidence from a plaintiff-physician. Under Rule 301, FED. R. EVID., a physician against whom such a presumption is directed must come forward with "evidence to rebut or meet the presumption." If the physician submits evidence to rebut the presumption, the hospital nevertheless retains the burden of proving the affirmative defense of reasonable action under Rule 301. Since the HCQIA does not relieve a hospital of its burden of proof on the requirements for immunity through the assertion of the evidentiary presumption, and there is no indication of such a Congressional intent in the legislative history of the statute, the physician does not assume the burden of proof on the question of immunity under Rule 301. Thus, at the summary judgment stage, the job of the district court in a proceeding in which immunity is asserted under the HCQIA first is to determine whether the physician's evidence is sufficient to overcome the

presumption of reasonable initial action. The district court then must determine whether the evidence raises any material issues of fact on the reasonableness of the hospital's investigative efforts, its hearing procedures, and its final action. On appeal, the job of the appellate courts is to review the physician's evidence *de novo*.

2. Petitioner Harold D. Johnson, M.D., is a board-certified obstetrician/gynecologist who established a solo medical practice in 1981. Overwhelmingly, Dr. Johnson provided services to poor, Medicaid beneficiaries, who resided east of the Anacostia River in Washington, D.C.[1] He is a good surgeon.[2] At the time of the events in question, Dr. Johnson had practiced obstetrics and gynecology for nearly 10 years without a single malpractice claim settled or adjudicated against him.[3] However, some physicians thought Dr. Johnson had a bad "attitude" when he responded to them by handwritten, rather than by typewritten, notes.[4]

Greater Southeast Community Hospital is a subsidiary of

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[1] *Affidavit of Harold D. Johnson, M.D., in Opposition to Defendants' Motion to Dismiss and/or for Summary Judgment* ¶s 12-13, filed November 5, 1990; Ex 16 to *Plaintiff's Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss and/or for Summary Judgment* at 13, filed November 5, 1990.

[2] 1995 HCQIA Opp. Ex 88 at 2, *also filed as*, Ex 6 to *Plaintiff's Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss and/or for Summary Judgment* on November 5, 1990 ("Dr. McCants stated the physician's surgical technique was not in question").

[3] Ex 10 to *Plaintiff's Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss and/or for Summary Judgment*, filed November 5, 1990.

[4] *Transcript of Medical Adjudication Hearing*, 1/15/90, at 156, filed September 27, 1990; 1995 HCQIA Opp. Ex 65.

the Greater Southeast Healthcare System.[5] On January 28, 1988, the Greater Southeast Community Hospital Foundation adopted a "strategic plan" that called for the development of 500 managed-care admissions to its hospital.[6] Throughout 1988, Dr. Johnson admitted 488 patients to Greater Southeast Community Hospital.[7] Also in 1988, an *ad hoc* committee of non-obstetrician/gynecologists conducted a retrospective chart review of Dr. Johnson's cases and concluded that no quality assurance issues had been found.[8]

On July 7, 1989, the hospital publicly announced its agreement to provide health care services to members of the Johns Hopkins Health Plan through its hospital-based physician group, United Health Services.[9] As part of that exclusive agreement, the hospital, the Johns Hopkins Health Plan, and

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[5] "The Greater Southeast Healthcare System (the "System") comprises The Greater Southeast Community Hospital Foundation, Inc. . . .and its not-for-profit and for-profit subsidiaries. The System is a vertically integrated health care delivery system providing health care services through a network of community hospitals, nursing homes and home health care and community based programs. The System primarily serves residents of the southeast quadrant of the District of Columbia . . .The System is served by more than 450 physicians." Ex L to Dr. Johnson's 1995-supplement to his 1990-statement of disputed facts filed pursuant to Local Rule 108(h). *See also* Ex 17 to *Plaintiff's Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss and/or for Summary Judgment* at 13, filed November 5, 1990.

[6] Ex B to Dr. Johnson's 1995-supplement to his 1990-statement of disputed facts filed pursuant to Local Rule 108(h) on June 12, 1995.

[7] Ex 16 to *Plaintiff's Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss and/or for Summary Judgment* at 13, filed November 5, 1990.

[8] *Transcript of Medical Adjudication Hearing*, 1/15/90, at 35, 49, filed September 27, 1990; 1995 HCQIA Opp. Ex's 61, 62, 65, 69, *also filed as*, Ex 2 to *Plaintiff's Memorandum of Points and Authorities in Support of Motion for Partial Summary Judgment* on September 28, 1990.

[9] Stephen K. Cooper, *Hopkins HMO Ties to Greater Southeast*, *WASHINGTON TIMES*, July 7, 1989, at C1.

United Health Services planned to provide managed care services to Medicaid beneficiaries.[10] On August 17, 1989, following a second retrospective chart review by an *ad hoc* committee of obstetrician-gynecologists within the department[11] the hospital suspended Dr. Johnson's privileges.[12]

After the hospital posted notice of the suspension in all of its departments,[13] and Dr. Johnson attended a hearing before the Medical Staff Executive Committee, on August 23, 1989, that committee restored his privileges subject to the requirement that he participate in a physician monitoring program.[14] On October 23 1989, the hospital Board of Directors rejected the recommendation of the Medical Staff Executive Committee and, instead, terminated Dr. Johnson's admitting privileges.[15] The Board took that action even though not a single hospital committee, entity, or physician ever recommended that the hospital terminate Dr. Johnson's privileges.[16] As a result of the

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[10] Ex 12 to *Plaintiff's Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss and/or for Summary Judgment* at 13, filed November 5, 1990; Ex D to Dr. Johnson's 1995-supplement to his 1990-statement of disputed facts filed pursuant to Local Rule 108(h).

[11] *Transcript of Medical Adjudication Hearing*, 2/15/90, at 59.

[12] 1995 HCQIA Opp. Ex 78, *also filed as*, Ex 7 to *Plaintiff's Memorandum of Points and Authorities in Support of Motion for Partial Summary Judgment* on September 28, 1990.

[13] 1995 HCQIA Opp. Ex 79.

[14] *Transcript of Medical Adjudication Hearing*, 3/22/90, at 26; 1995 HCQIA Opp. Ex 80; Compl. Ex E, *also filed as*, 1995 HCQIA Opp. Ex 81.

[15] 1995 HCQIA Opp. Ex 88 at 2, *also filed as*, Ex 6 to *Plaintiff's Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss and/or for Summary Judgment* on November 5, 1990.

[16] *Transcript of Medical Adjudication Hearing*, 2/16/90, at 253, filed September 27, 1990.

hospital's action, United Health Services and the Johns Hopkins Health Plan denied membership to Dr. Johnson the very next day;[17] he is not a participant in that integrated delivery system.[18]

In July 1990, Dr. Victor Nelson (defendant-appellee) caused Columbia Hospital for Women to suspend Dr. Johnson's privileges pending review of the index cases from the hospital.[19] Dr. Johnson then filed suit in August 1990 and the parties filed cross-motions for summary judgment on September 28, 1990. Dr. Johnson moved for partial summary judgment on his civil rights claims, arguing principally that the hospital had failed to explain why it terminated his privileges but reappointed three white physicians whom it knew to be incompetent through their long histories of malpractice claims and judgments.[20] The hospital claimed, *inter alia*, that it was entitled to immunity under the HCQIA.[21]

On October 31, 1990, Columbia Hospital for Women restored Dr. Johnson's privileges at that facility following its

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[17] *Transcript of Medical Adjudication Hearing*, 3/22/90, at 13-14, filed September 27, 1990; Ex 4 to the Deposition of David E. Brown, then-president of the hospital and of United Health Services.

[18] An integrated delivery system is "a comprehensive continuum of health care services made available to a defined community within a geographic region through a financially integrated, centrally managed network of health care providers." DOUGLAS E. GOLDSTEIN, ALLIANCES: STRATEGIES FOR BUILDING INTEGRATED DELIVERY SYSTEMS 6 (1995).

[19] Compl. Ex M; Ex C to 1990-*Declaration of Victor J. Nelson*, M.D.; *Affidavit of Harold D. Johnson, M.D. in Opposition to Defendant's Motion to Dismiss and/or for Summary Judgment* at ¶ 5, filed November 5, 1990.

[20] *See Memorandum of Points and Authorities in Support of Plaintiff's Motion for Partial Summary Judgment* and its attached Ex's 3, 8, 10, 11, 12, 13, 14, 15, 16, filed September 28, 1990.

[21] The hospital also claimed that lawsuits such as this one are excluded entirely from the purview of federal civil rights laws.

review of the index cases from the hospital.[22] Thereafter, on November 5, 1990, Dr. Johnson filed a memorandum opposing the hospital's dispositive motion together with two (2) affidavits and 16 exhibits.[23] The district court dismissed the case as not ripe on December 12, 1990 since an internal hearing had not concluded and the court of appeals reversed in December 1991.

During the six (6) months between July 1992 and February 1993, Dr. Johnson sought unsuccessfully to compel discovery in this case.[24] Without explanation, the district court refused to compel discovery in December 1992 and left "to the parties the burden of resolving their disputes over the substance of any discovery requests or responses." App. 96a.[25] On February 1, 1993, Dr. Johnson again filed a motion to compel discovery. In May 1993, after the hospital filed several overlapping motions for summary judgment, Dr. Johnson moved for a stay of substantive briefing until the district court acted on his outstanding discovery motion.

The trial court held the last hearing in this case was on June 3, 1993.[26] In March 1994, Dr. Johnson filed a motion for

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[22] *Affidavit of Harold D. Johnson, M.D. in Opposition to Defendant's Motion to Dismiss and/or for Summary Judgment* at ¶ 5; Ex 11 to *Plaintiff's Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss and/or for Summary Judgment* at 13, filed November 5, 1990.

[23] Dr. Johnson filed a 17th exhibit with his supplemental memorandum in opposition on December 6, 1990.

[24] Dr. Johnson filed motions to compel discovery on July 14, 1992, on November 3, 1992, and on February 1, 1993.

[25] Also that day, the district court granted the hospital's motion to quash a third-party subpoena Dr. Johnson had issued to the bond issuer (Alex. Brown, Inc.) in a then-recent hospital transaction seeking access to financial data the hospital had refused to produce. App. 98a.

[26] The court below did not ever hold a hearing on the post-1990-motions for summary judgment.

a hearing on the discovery requests he had filed the previous year. Two years after Dr. Johnson filed his last motion to compel discovery, in January 1995, the court below denied that motion as well as his 1994-motion seeking to stay substantive briefing pe' 'ing the completion of discovery, noting that Dr. Johnson would

> [P]refer to await answers to pending interrogatories as well as resolution of [his] motion to compel document production. Among the matters on which plaintiff seeks discovery are financial data, details of contracts, and definitions of defendant hospital's relevant market. Each of these items is pertinent, states the plaintiff, to underlying substantive issues. Without adequate discovery, plaintiff contends he is unable to respond properly to the summary judgment motions.

App. 90a-91a.

In light of that district court's refusal to permit discovery, on June 1, 1995 Dr. Johnson opposed the hospital's motion for summary judgment asserting entitlement to immunity under the HCQIA and filed as exhibits thereto the documents then available to him. Dr. Johnson responded to the hospital's reply on June 19, 1995. With those two (2) memoranda, Dr. Johnson attempted to demonstrate the economic motivations for the hospital's actions. He filed 114 exhibits including: affidavits; deposition excerpts; answers to interrogatories; official public documents; transcripts of proceedings; and business records, albeit as redacted by the hospital. Dr. Johnson argued that the evidence would permit the trier of fact to reject the hospital's immunity defense notwithstanding the statutory presumption in

its favor.[27]

Dr. Johnson supported his opposition to the grant of immunity with expert testimony from Dr. Donald J. Sewell, Senior Attending Physician at the Washington Hospital Center, who testified unequivocally at the hospital hearing that Dr. Johnson had not deviated from the standard of care in any of the seven (7) cases at issue.[28] Dr. Johnson included affidavits from: 1) Robert A. Briskman, a private investigator (stating that his investigation revealed the undisclosed fact that the hearing officer and the instigating board member were colleagues at the George Washington University);[29] and 2) Sylvia B. Daniels, R.N., B.S.N., Director of Quality Management, University of Maryland Medical System (offering her expert opinion that the hospital's actions did not comport with contemporary quality assurance protocols for identifying and improving poor patient care).[30]

In his opposition, Dr. Johnson included deposition testimony from: 1) Dr. Raymond W. Turner (defendant-appellee), then the hospital's medical director;[31] 2) Andrea J. Sloan, then the hospital's risk manager;[32] 3) Dr. Edward Werner

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[27] The hospital did not challenge any of the evidence Dr. Johnson brought forward. Indeed, Dr. Johnson refiled in 1995 much of the same evidence he had filed in 1990 to oppose the 1990-motion for summary judgment and as he had filed in 1992, 1993, 1994, and 1995 in support of his motions seeking discovery.

[28] *Transcript of Medical Adjudication Hearing*, 3/22/90, at 194-95, 204, 224, 234, 240, 247, filed September 27, 1990, *also filed as*, 1995 HCQIA Opp. Ex 3 on June 1, 1995.

[29] 1995 HCQIA Opp. Ex 91, *also filed as*, Ex 13 to Dr. Johnson's opposition to the hospital's motion for summary judgment on November 5, 1990.

[30] 1995 HCQIA Opp. Ex 4.

[31] 1995 HCQIA Opp. Ex 100.

[32] 1995 HCQIA Opp. Ex 8.

(discussing his own summary suspension and subsequent reappointment in 1989 following a maternal death at his hands and a hospital review disclosing 17 then-extant malpractice claims, and including documents that show the hospital submitted his cases to external reviewers who followed standard quality assurance review protocols prior to taking adverse action against him);[33] 4) Garylee Cox, Regional Vice President of the American Arbitration Association (stating that she selected the hearing officer because he had been acceptable to the hospital on the two (2) previous occasions when physicians challenged the termination of their privileges, not that he was chosen randomly as the hospital bylaws require);[34] and 5) Dr. William R. Coyle (defendant-appellee), one of three reviewers responsible for criticizing Dr. Johnson's cases (stating that he would participate in the "call" schedule for indigent Medicaid patients, as had Dr. Johnson prior to termination, if the hospital raised the payment to a hoped-for $5,000.00 per 24-hour period).[35]

Likewise, Dr. Johnson included the hospital's 1992-answers to his third set of interrogatories in which it refused to answer any questions concerning its strategic plans to increase its market share as a provider of women's health services[36] and

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[33] 1995 HCQIA Opp. Ex's 14, 14(a), 14(b), 14(c), 14(d), 14(e), 14(f), 14(g).

[34] 1995 HCQIA Opp. Ex 90. The district court incorrectly held (App. 22a) that the hearing officer had been assigned randomly in conformance with the hospital bylaws. However, even the hospital admitted that he had been chosen specially, not assigned randomly, and claimed that Dr. Johnson should have been satisfied with proceeding before "an experienced hearing officer in a manner comporting with the rules generally applicable in arbitration proceedings." *Defendants' Reply to Plaintiff's Memorandum in Opposition to Defendants' Motion for summary Judgment on Grounds of HCQIA Immunity* at 16.

[35] Ex A to Dr. Johnson's 1995-statement of disputed facts filed pursuant to Local Rule 108(h).

[36] Ex O to Dr. Johnson's 1995-supplement to his 1990-statement pursuant to Local Rule 108(h).

excerpts of its 1993-bond offering document describing its position in the relevant market.[37] Also, Dr. Johnson included copies of the hospital's business records, such as the minutes from 14 board meetings,[38] minutes from 23 Medical Staff Executive Committee meetings,[39] minutes from four (4) Quality Assurance Committee meetings,[40] transcriptions of the August 1989-hearings before the Medical Staff Executive Committee.[41] Dr. Johnson included as well official hospital records contrasting how Dr. Edward Werner was subjected to review under the Credentialing Policy,[42] how his index case traveled through the quality assurance system from the surgical review committee[43] through the Medical Staff Executive Committee[44] to the hospital board[45] prior to the restrictions placed on his privileges in 1988,

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[37] Ex's L, M to Dr. Johnson's 1995-supplement to his 1990-statement pursuant to Local Rule 108(h). Dr. Johnson filed the complete bond offering document as Ex A to his May 10, 1993-motion to stay substantive briefing until the completion of discovery. As Ex C to that motion, Dr. Johnson also filed excerpts from the deposition of Dalton A. Tong, then-Chief Financial Officer of the hospital, together with an exhibit (Ex D) demonstrating the hospital's attempts to penetrate the Medicaid market.

[38] 1995 HCQIA Opp. Ex's 28, 35, 40, 41, 42, 43, 48, 51, 59, 85, 86, 87, 88.

[39] 1995 HCQIA Opp. Ex's 16, 18, 20, 21, 22, 23, 25, 35, 39, 44, 45, 49, 51, 56, 57, 58, 61, 62, 65, 67, 68, 77, 80.

[40] 1995 HCQIA Opp. Ex's 26, 29, 46, 108.

[41] Ex Q to Dr. Johnson's 1995-supplement to his 1990-statement pursuant to Local Rule 108(h).

[42] Compl. Ex D, *also filed as*, 1995 HCQIA Opp. Ex 4(c); 1995 HCQIA Opp. Ex 6.

[43] 1995 HCQIA Ex's 15, 17, 19, 22, 27, 38.

[44] 1995 HCQIA Ex's 16, 18, 20, 21, 23, 25.

[45] 1995 HCQIA Opp. Ex's 26, 27.

how the hospital used outside reviewers in his case,[46] and how the hospital monitored him before restoring his privileges.[47] Finally, Dr. Johnson filed earnings statements from the Johns Hopkins Health Plan and United Health Services for Drs. Coyle and Nelson, the competing physicians whose case reviews formed the basis for the hospital action.[48]

In October 1995, the district court again dismissed the action on ripeness grounds without addressing any of Dr. Johnson's evidence. App. 28a-60a.[49] In June 1996, the district court vacated its October 1995-order and dismissed Dr. Johnson's entire case. App. 7a-27a. The district court did not

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[46] 1995 HCQIA Opp. Ex's 14(a), 14(b), 37.

[47] 1995 HCQIA Opp. Ex's 34, 35, 48, 49, 52, 53, 55, 56, 57, 58, 59, 62.

[48] Ex F to Dr. Johnson's 1995-supplement to his 1990-statement pursuant to Local Rule 108(h), *also filed as*, Ex's F and G to *Plaintiff's Supplemental Memorandum in Support of Motion for Stay and for the Imposition of Sanctions* on June 3, 1993.

[49] On June 12, 1995, Dr. Johnson also had filed 24 exhibits with his supplemental memorandum in support of his 1990-motion for partial summary judgment and in opposition to the hospital's 1993-motion for summary judgment on civil rights claims that the district court refused to accept and failed to address in its October 1995-order. Dr. Johnson's submission of that day included: 1) the hospital's answers to his first set of interrogatories; 2) an affidavit from Alfred Edwards, Jr., M.D. (a physician previously terminated by the hospital through the actions of Dr. Coyle and Dr. Edward Hinman, defendants below); 3) additional excerpts from Dr. Coyle's deposition; 4) the hospital's 1990-statement of disputed facts filed in response to Dr. Johnson's 1990-motion for partial summary judgment; 5) excerpts of the deposition of Dr. Henry Gering (chairman of the department in 1988); 6) additional excerpts of the deposition of Dr. Edward Werner; 7) a second affidavit from Sylvia B. Daniels, R.N., B.S.N., Director of Quality Management, University of Maryland Medical System; 8) an affidavit from Russell L. Adams, Ph.D., offering expert testimony pertinent to the hospital's claim of exemption from Title VII; 9) additional excerpts of the deposition of David E. Brown, then-president of the hospital and of United Health Services; and 10) excerpts of the deposition of Dr. Nelson.

In spite of those submissions, and those of 1990, the district court also dismissed Dr. Johnson's civil rights claims by holding that neither 42 U.S.C. § 2000(e) (Title VII) nor 42 U.S.C. § 1981 applies to the factual situation here presented.

address, however, the sufficiency of Dr. Johnson's 114 exhibits and affidavits offered in 1995, or of those offered in 1990, to rebut the presumption of reasonable initial action when it held that he "failed to rebut this presumption by a preponderance of the evidence" and granted summary judgment to the hospital on the question of its immunity. App. 25a.[50] On appeal, the court of appeals did not address any of Dr. Johnson's evidence when it summarily affirmed the district court's decision.

REASONS FOR GRANTING THE PETITION

The decision in this case alters the proof requirements of Rule 301, FED. R. EVID., when hospitals raise the defense of immunity under the HCQIA in response to lawsuits by physicians alleging misuse of the peer review process. It permits a court to award summary judgment to a hospital without reviewing the evidence produced by a physician to rebut the statutory presumption of reasonable initial action and thereby expands the presumption without any indication that Congress intended so broad a reach. Therefore, the decision conflicts with this Court's interpretation of Rule 301 in *Saint Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), and with its interpretation of Rule 56, FED. R. CIV. P., in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

The Court should resolve this question because courts, such as the lower courts here, have expanded the evidentiary presumption of reasonable initial action beyond the parameters drawn in the statute. Thus, where Congress intended only a

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[50] The district court actually granted "defendants' motion for summary judgment on plaintiff's antitrust claims." App. 25a. In *dicta*, the district court held, alternatively, that Dr. Johnson had not opposed the hospital's motion on the substantive antitrust claim even though he previously had requested an enlargement of time within which to complete his response.

limited presumption,[51] many courts have created insurmountable obstacles for physicians seeking to protect their practices through judicial review. [52] Those obstacles, taken with decisions that have excluded self-employed female,[53] foreign-born, [54]and African-American physicians, such as Dr. Johnson,[55] from the protections afforded by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e), have effectively closed all avenues for judicial review of the actions by hospitals and their managed-care affiliates to eliminate targeted physicians as service providers at the close of the millennium.[56] Equally important to

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[51] *See Manion v. Lima Memorial Hosp.*, 986 F.2d 1036 (6th Cir. 1992) (holding that HCQIA shields peer reviewers from liability only, not from suit entirely), *cert. denied*, 114 S. Ct. 71 (1993); *Decker v. IHC Hosps. Inc.*, 982 F.2d 433 (9th Cir. 1992) *(same), cert. denied*, 113 S. Ct. 3041 (1993).

[52] *See, e.g., Bryan v. James E. Holmes Regional Medical Ctr.*, 33 F.3d 1318 (11th Cir. 1994) (reversing jury determination that the physician was entitled to damages on his breach of contract claim based on HCQIA-immunity), *cert. denied*, 115 S. Ct. 1363 (1995).

[53] *State Comm'n on Human Relations v. Suburban Hosp., Inc.*, 686 A.2d 706 (Md. App. 1996) (holding that Title VII did not apply to female physician's claim of gender discrimination).

[54] *Alexander v. Rush N. Shore Medical Ctr.*, 101 F.3d 487 (7th Cir. 1996) (holding that Title VII did not apply to Egyptian-born Muslim's claims of discrimination).

[55] *Beverly v. Diggs*, 591 F. Supp. 1321 (S.D.N.Y. 1984).

[56] For example, Suburban Hospital of Bethesda, Maryland, has been successful in shielding its decisions to terminate, or not reappoint, physicians from judicial scrutiny under both Title VII and the HCQIA in separate actions. *See State Comm'n on Human Relations v. Suburban Hosp., Inc.*, 686 A.2d at 724; *Imperial v. Suburban Hosp. Assn., Inc.*, 37 F.3d 1026 (4th Cir. 1994) (finding hospital entitled to immunity under the HCQIA). Those physicians now are excluded from a recently-announced joint venture between Suburban Hospital and the Johns Hopkins University Hospital. *See* Stuart Auerbach, *Johns Hopkins, Suburban Hospital Forms Partnership; Alliance Gives Baltimore Facility a D.C. Presence, WASHINGTON POST*, July 25, 1996, at D14.

this Court's consideration is the public's right to know that the independent practitioners who served them in the past will not be excluded summarily from serving them in the future as hospital-based integrated delivery systems -- like the Greater Southeast Community Hospital/Johns Hopkins Health Plan/United Health Services venture here -- become the predominant model for medical care in this country.[57] Review by this Court of the question presented therefore is warranted.

1. The court of appeals' order to let stand the district court's decision is at odds with this Court's analysis of Rule 301 in *Saint Mary's Honor Center v. Hicks*, *supra*, in significant respects. Under Rule 301, as interpreted by this Court, a physician against whom the statutory presumption of reasonable initial action is cast should be directed to come forward with evidence to rebut that presumption. *A fortiori*, once the physician comes forward with the evidence, the trier of fact is required to evaluate it. *Cf. Smith v. Ricks*, 798 F. Supp. 605, 607, 611 (N.D. Cal. 1992) (noting review of 22 exhibits submitted by plaintiff-physician opposing the grant of immunity under the HCQIA), *aff'd*, 31 F.3d 1478 (9th Cir. 1994), *cert. denied*, 1996 U.S. LEXIS 2275. Nevertheless, the burden of proof, as in the risk of nonpersuasion, should remain at all times with the hospital asserting the presumption. *Saint Mary's Honor Ctr. v.*

In another instance, a court has held that the privileging decision of a hospital was excluded from coverage under Title VII and that the particular hospital also was entitled to immunity under the HCQIA. *See, e.g., Pamintuan v. Nanticoke Memorial Hosp.*, 1997 U.S. Dist. LEXIS 3300 (D. Del. February 24, 1997).

[57] In a 1994-survey, the accounting firm of Deloitte & Touche reported that 71 percent of the hospitals in the nation then were in the process of developing integrated delivery systems with 89 percent of inner-city hospitals expected to adopt that model by the end of the century. *See* Spencer Rich, *U. S. Hospitals Aren't Waiting for Congress, WASHINGTON POST*, June 21, 1994, at A4.

Hicks, 509 U.S. at 511.[58] Although Dr. Johnson met his burden of producing evidence for the trier of fact to consider, the district court did not evaluate that evidence before granting summary judgment to the hospital and thereby obliterated the proof requirements of Rule 301 applicable when there is an evidentiary presumption in operation. The district court's failure to evaluate the sufficiency of Dr. Johnson's evidence, and to determine whether the statutory presumption had been overcome by the specific evidence before it, therefore is in conflict with the Court's interpretation of Rule 301.

However, the conflict left standing by the court of appeals is an artificial one lacking Congressional support for the presumption actually afforded a defending hospital under the HCQIA is in harmony with the Court's interpretation of Rule 301. By enacting the presumption of § 412(a) of the HCQIA, Congress did not intend to change the burden of proof otherwise applicable in this civil action filed under federal antitrust and civil rights laws. Rather, the legislative history of the HCQIA indicates a Congressional intent to permit an antitrust action where the presumption of reasonable initial action is overcome by a preponderance of the evidence and not at all to affect a physician's right to declaratory or injunctive relief, or to pursue a civil rights claim.[59] It provides

> [T]he bill does not restrict the rights of physicians who are disciplined to bring private causes of action for injunctive or declaratory relief. If the professional review action being

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[58] In *Gomez v. Toledo*, 446 U.S. 635 (1980), the Court held that the right to "qualified immunity" is an affirmative defense upon which a defending public official bears the burden of proof in an action brought under 42 U.S.C. § 1983. *But see Brader v. Allegheny Gen. Hosp.*, 64 F.3d 869, 878 (3d Cir. 1995) (holding that physician bears burden of proving noncompliance with immunity provisions).

[59] *See* 42 U.S.C. § 11111(a).

> challenged fails to meet the standards of section 102(a), no immunity is provided and the suit can be tried without regard to the provisions of this bill.
>
> * * *
>
> [T]he subsection provides a presumption to that a effect ["reasonable belief"] . . . This presumption applies only to the reasonable belief standard not to the others. . .
>
> * * *
>
> In any case, it is the Committee's intent that physicians receive fair and unbiased review to protect their reputations and medical practices.

H. Rep. No. 903, 99th Cong., 2d Sess. 9, 10, 11, *reprinted in*, 1986 U.S.C.C.A.N. 6392, 6393.

Congress intended to do no more than to grant hospitals the benefit of an unremarkable evidentiary presumption of reasonable initial action. That presumption may be overcome by a "preponderance of the evidence." 42 U.S.C. § 11112(a). Under that standard common in civil practice, the trier of fact must "believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence." *In re Winship*, 397 U.S. 358, 371-72 (1970). Simply put, the trier of fact must weigh the evidence on both sides and determine which evidence more probably establishes the fact urged by its respective proponent. The failure to engage in that careful weighing of the evidence here makes Rule 301 a nullity in cases where the HCQIA is raised in defense to a lawsuit based on a hospital peer review action. That implicit modification of Rule

301 is a significant question of federal law this Court should resolve.

2. The decision below also conflicts with the law of this Court on the role of a court when presented with a motion for summary judgment. Summary judgment for the moving party is appropriate only when there has been adequate discovery and the non-moving "party fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The non-moving party's burden is one of producing evidence that is "significantly probative" of the issues raised in his complaint so as to preclude the grant of summary judgment to the moving party. *First Nat'l Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253, 290 (1968).

Before summarily granting immunity to the hospital, "the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby*, 477 U.S. at 255. Here, the job of the district court, and of the appellate court on *de novo* review, was to determine whether Dr. Johnson's specific evidence raised any issues of material fact on the reasonableness of the hospital's initial action, on the reasonableness of its investigative efforts, on the reasonableness of its hearing procedures, or on the reasonableness of its final action, so as to preclude the summary grant of immunity under the HCQIA. *id.* at 254. Assuming the hospital met its burden of production under Rule 56, each court then was obligated to analyze the evidence put forward by the physician, as other courts have done, as a necessary predicate action to the award of summary judgment. *See, e.g., Brown v. Presbyterian Healthcare Serv.*, 101 F.3d 1324, 1333 (10th Cir. 1996) (noting that expert testimony on behalf of physician created triable issue of fact on reasonableness of hospital's action); *see also Bryan v. Holmes Medical Ctr.*, 33 F.3d at 1334 (noting that court "must examine the record in [the] case and determine whether [the physician]

satisfied his burden of producing evidence that would allow a reasonable jury to conclude that the Hospital's peer review disciplinary process failed to meet the standards of the act"), *cited in Matthews v. Lancaster Gen. Hosp.*, 87 F.3d 624, 633 (3d Cir. 1996); *Austin v. McNamara*, 979 F.2d 728, 734 (9th Cir. 1992) (same).

Thus were the courts below required to apply the general Congressional admonishment against the use of competing physicians as reviewers[60] -- and the hospital's own admission that such actions are violative of antitrust laws[61] -- to Dr. Johnson's evidence of review solely by competing physicians who failed to use objective criteria to review his cases[62] and who gained financially from the integrated delivery system after his exclusion from its panel of providers to determine the reasonableness of the hospital's action. *See Fobbs v. Holy Cross Health Sys. Corp.*, 789 F. Supp. 1054, 1065, 1066 (E.D. Cal. 1992) (finding hospital was entitled to immunity since it sought an outside evaluation of the index cases prior to taking adverse action), *aff'd*, 29 F.3d 1439 (9th Cir. 1994), *cert. denied*, 1995 U.S. LEXIS 757 (1995); *see also Matthews v. Lancaster Gen. Hosp.*, 87 F.3d at 633 (same). So, too, should the lower courts have determined whether Dr. Johnson's evidence that the Board refused to institute a monitoring program as the Medical Staff Executive Committee recommended,when not a single physician or committee ever recommended termination, was a reasonable

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[60] Congress generally intended that a hospital hearing panel be composed of reviewers from different specialities or from different geographic locations. *See* H. Rep. No. 903, 99th Cong., 2d Sess. 11, *reprinted in*, 1986 U.S.C.C.A.N. 6393. The contrary view of the district court (17a) is wrong.

[61] 1995 HCQIA Opp. Ex 101, stating that "[a]ntitrust law demands that hospitals not use local competitors to evaluate a physician's . . . clinical performance."

[62] 1995 HCQIA Opp. Opp. Ex's 2 at 37, 40, 63, 70; 9 at ¶ 3; 10 at ¶ 6. *See also* Declaration of (defendant) Victor Nelson at ¶ 7.

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23

hearing procedures. And so, too, should the lower courts have evaluated each of the 114 specific exhibits Dr. Johnson brought forward in 1995, along with all other evidence he submitted between 1990 and 1995, before awarding summary judgment to the hospital based on an evidentiary presumption applicable to a single prong of a statutory four-part test.

Because the district court decision left standing by the court of appeals fails to detail why the evidence put forward was insufficient to survive the motion for summary judgement, it expands the umbrella of immunity beyond the limited parameters contemplated by Congress: It creates the right to absolute immunity for a hospital under the HCQIA. Congress did not intend to grant hospitals the right to exclude physicians from their integrated delivery systems with complete impunity. The Court should resolve this important issue of federal law.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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excluded the guidelines of the American College of Obstetricians and Gynecologists on quality assurance and peer review (Ex's 4, 5, to Dr. Johnson's 1990-motion for partial summary judgment, *also filed as*, 1995 HCQIA Opp. Ex's 4(d), 4(e)) and the hospital's Credentialing Policy (Compl. Ex D, *also filed as*, 1995 HCQIA Opp. Ex's 4(c), 6). *See Transcript of Medical Adjudication Hearing*, 2/15/90, at 66-69, 123-26, 146-47; 2/16/90 at 258-60.

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. 96-

In the Supreme Court of the United States

OCTOBER TERM, 1996

HAROLD D. JOHNSON, M.D.,
PETITIONER,

v.

GREATER SOUTHEAST COMMUNITY HOSPITAL CORPORATION, *et al.*,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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APPENDIX

Page

APPENDIX A
ORDER OF THE COURT OF APPEALS GRANTING SUMMARY AFFIRMANCE 1a

APPENDIX B
ORDERS OF THE COURT OF APPEALS DENYING SUGGESTION FOR REHEARING *IN BANC* AND PETITION FOR REHEARING 3a

APPENDIX C
ORDER OF THE COURT OF APPEALS DENYING WRIT OF MANDAMUS 5a

APPENDIX D
SECOND MEMORANDUM OPINION AND ORDER OF THE DISTRICT COURT 7a

APPENDIX E
FIRST MEMORANDUM OPINION OF THE DISTRICT COURT (903 F. Supp. 140) 28a

APPENDIX F
FIRST ORDER DISMISSING ALL CLAIMS 61a

Page

APPENDIX G
1991 OPINION OF THE COURT OF APPEALS
(951 F.2d 1268) 63a

APPENDIX H
MEMORANDUM AND ORDER DENYING DEFENDANTS' REQUEST FOR ATTORNEYS' FEES 82a

APPENDIX I
ORDER OF THE DISTRICT COURT GRANTING MOTION FOR ENLARGEMENT OF TIME 87a

APPENDIX J
MEMORANDUM OPINION AND ORDER DENYING DISCOVERY REQUEST 89a

APPENDIX K
ORDER GRANTING IN PART AND DENYING IN PART MOTION FOR DISCOVERY 95a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Harold D. Johnson, M.D.,
Appellant,

v. NO. 95-7253

Greater Southeast Community
Hospital Corporation, *et al.*,
Appellees.

Consolidated with 96-7132

BEFORE: Silberman, Randolph, and Rogers, Circuit Judges

ORDER

Upon consideration of appellant's supplemental memorandum in support of appellant's motion to expedite consideration of appeal and for summary reversal, the opposition thereto, and the reply; appellees' cross-motion for summary affirmance and the opposition thereto; and appellees' motion to dismiss appeal as to order of April 16, 1992, and the opposition thereto; it is

ORDERED that the motion for summary affirmance be granted substantially for the reasons stated by the district court in its memorandum opinions and orders filed October 19, 1995, and June 24, 1996. The merits of the parties' positions are so clear as to warrant summary action. *See Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam); *Walker v. Washington*, 627 F.2d 541, 545 (D.C. Cir.) (per

curiam), *cert. denied*, 449 U.S. 994 (1980). It is

FURTHER ORDERED that the motion for summary reversal be denied. It is

FURTHER ORDERED that the motion for expedited consideration of appeal No. 95-7253 be dismissed as moot. It is

FURTHER ORDERED that the motion to dismiss the appeal as to Kurt Darr and as to the district court order dated April 16, 1992, be denied. It appears that appellant's amended notice of appeal was timely under FED. R. APP. P. 4. *See generally In Re Highway Truck Drivers & Helpers Local 107*, 888 F.2d 293, 296 n.4 (3rd Cir. 1989); *Napier v. Thirty or More Unidentified Federal Agents*, 855 F.2d 1080, 1089 (3rd Cir. 1988); *see also S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1085 (9th Cir. 1989). Appellant's appeal of the order filed April 16, 1992, awarding attorney's fees to appellee Darr, will proceed in the normal course.

The Clerk is directed to withhold issuance of the mandate herein until resolution of the remainder of the appeal.

Per Curiam

LHS
ARR
JWR

DATED: October 9, 1996

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Harold D. Johnson, M.D.,
Appellant,

v.

NO. 95-7253

Greater Southeast Community
Hospital Corporation, *et al.*,
Appellees.

Consolidated with 96-7132

BEFORE: Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers and Tatel, Circuit Judges

ORDER

Upon consideration of appellant's Suggestion for Rehearing *In Banc*, and the absence of a request by any member of the court for a vote, it is

ORDERED that the suggestion be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Robert A. Bonner
Deputy Clerk

DATED: January 31, 1997

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Harold D. Johnson, M.D.,
Appellant,

v. No. 95-7253

Greater Southeast Community
Hospital Corporation, *et al.*
Appellees

Consolidated with 96-7132

BEFORE: Silberman, Randolph and Rogers, Circuit Judges

O R D E R

Upon consideration of appellant's petition for rehearing filed November 8, 1996, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/
Robert A. Bonner
Deputy Clerk

DATED: January 31, 1997

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Harold D. Johnson, M.D.,
Appellant,

v. NO. 95-7253

Greater Southeast Community
Hospital Corporation, *et al.*,
Appellees.

Consolidated with 96-7132

BEFORE: Williams, Sentelle, and Rogers, Circuit Judges

ORDER

Upon consideration of the petition for writ of mandamus; the motion to consolidate; appellant's combined motion to expedite and for summary reversal, filed in No. 95-7253, the opposition thereto, and the reply; appellees' motion to dismiss No. 95-7253 and the opposition thereto; and the supplemental authority provided by appellant/petitioner, it is

ORDERED that the petition for writ of mandamus be dismissed as moot. By order filed October 19, 1995, the district court dismissed the complaint in 90cv01992, *Johnson v. Greater Southeast Community Hospital, et al.* Appellant has failed to demonstrate that this case is "capable of repetition, yet evading review." *See Ganneft Co. v. DePasquale*, 443 U.S. 368, 377 (1979). It is

FURTHER ORDERED that the motion to consolidate be

dismissed as moot. It is

FURTHER ORDERED that the motion to dismiss be denied. Appellees' postjudgment motion filed in the district court suspends, rather than the destroys, the effect of the notice of appeal. See FED. R. APP. P. 4(a)(4); *id.*, advisory committee's note (1993 Amendment) (notice of appeal filed before the filing of Rule 52(b) motion is, in effect, suspended until motion is disposed of, whereupon the previously filed notice effectively places jurisdiction in court of appeals). It is

FURTHER ORDERED, on the court's own motion, that No. 95-7253 be held in abeyance pending the district court's disposition of appellees' motion to alter or amend judgment, properly construed as a motion to amend findings pursuant to FED. R. Civ. P. 52(b), filed October 25, 1995. See FED. R. APP. P. 4(a)(4); *cf. Leader Nat'l Ins. Co. v. Industrial Indem. Ins. Co.*, 19 F.3d 444, 445 (9th Cir. 1994) (under amended rules, notice of appeal held in abeyance by court of appeals until resolution of motion to amend judgment). Resolution of the motion to expedite and for summary reversal is deferred pending further order of the court.

The parties are directed to file motions to govern further proceedings within 30 days of the district court's disposition of appellees' pending motion to amend findings.

The Clerk is directed to transmit a copy of this order to the district court.

Per Curiam

SFL
DEW
JWR

DATED: March 12, 1996

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Harold D. Johnson, M.D.,
Plaintiff,

v.

Civil Action No. 90-1922
(RCL)

Greater Southeast Community
Hospital Corporation, *et al.*
Defendants.

MEMORANDUM OPINION AND ORDER

This matter comes before the court pursuant to a remand Order issued by the Court of Appeals for the District of Columbia Circuit on March 12, 1996, directing this court to consider defendants' motion to alter or amend this court's findings of fact with respect to the court's discussion of the ripeness of plaintiff's antitrust claims in the court's Memorandum Opinion and Order of October 19, 1995.

On August 17, 1990, plaintiff filed this action against Greater Southeast Community Hospital of Washington, D.C. ("Greater Southeast" or "Hospital') as well as some individually named defendants. In his complaint, Dr. Johnson set forth a number of antitrust, civil rights, and tort claims involving defendants' alleged conspiracy to terminate his Medical Staff membership and patient privileges at Greater Southeast, Johns Hopkins Health Plan ("Johns Hopkins"), United Health Services ("United"), and Columbia Hospital for Women Medical Center ("Columbia Hospital") because of his race. Complete dismissal of this case without prejudice was granted by Judge Revercomb on December 12, 1990. The court ruled that none of Dr.

Johnson's claims were ripe for adjudication because Dr. Johnson had not been officially terminated by Greater Southeast.

On December 13, 1991, the Court of Appeals reversed the dismissal, and remanded the case to this court for additional fact-finding on the issue whether plaintiff's membership and privileges had been terminated. *Johnson v. Greater Southeast Community Hosp. Corp.*, 951 F.2d 1268, 1273 (D.C. Cir. 1991). This court was further instructed to consider plaintiff's claims in the event that they were cured of any ripeness defect.

On October 19, 1995, this court again dismissed plaintiff's entire case. With respect to plaintiff's antitrust claims, the court ruled that these claims still had not ripened for purposes of adjudication. Plaintiff timely filed his notice of appeal. Shortly thereafter, defendants filed a post-judgment motion to alter or amend the court's judgment.

On March 12, 1996, the Court of Appeals ruled that plaintiff's appeal would be held in abeyance pending this court's resolution of defendants' motion to alter or amend. The Court of Appeals then remanded the case to this court for consideration of defendants' motion to alter or amend the judgment. Although defendants' motion is styled as a motion to alter or amend judgment pursuant to Federal Rules of Civil Procedure 59 and 60, the Court of Appeals instructed this court to construe defendants' motion as a motion to amend trial court findings pursuant to Rule 52(b). Accordingly, this court now considers defendants' motion.

In their motion to alter or amend, defendants seek to incorporate the fact that plaintiff's privileges at Greater Southeast were administratively revoked on July 8, 1992. Upon consideration of the filings and arguments of counsel, the court shall grant defendants' motion to alter the court's October 19, 1995 ruling. A finding that plaintiff's privileges were terminated removes the ripeness defect suffered by plaintiff's antitrust claims. Because the court now finds plaintiff's claims justiciable, this court, pursuant to the Court of Appeals' initial remand of this

matter, shall "consider [plaintiff's antitrust claims] on the merits." *Johnson*, 951 F.2d at 1273. Accordingly, the court shall vacate its prior ruling dismissing on mootness grounds defendants' motions for summary judgment on the antitrust claims against Greater Southeast, Johns Hopkins, and United.[1]

Upon consideration of defendants' ripe motion for summary judgment on grounds of immunity under the Health Care Quality Improvement Act of 1986 ("HCQIA"), 42 U.S.C. § 11101-111152 (1988), the court shall grant defendants' motion and shall dismiss plaintiff's antitrust claims with prejudice. Defendants' immunity motion, however, is not the only basis for dismissing plaintiff's claims. Defendants' other two motions for summary judgment on plaintiff's antitrust claims – defendants' motion for summary judgment on counts I, II, III, and IV (plaintiff's antitrust claims), and defendants' motion for summary judgment for the absence of antitrust injury – were unopposed by plaintiff. Under Local Rule 108 (b) , a court may treat as conceded an unopposed motion for summary judgment. Accordingly, these two motions provide alternative grounds for dismissing plaintiff's antitrust claims. The court's reasoning with respect to all of these matters is set forth below.

ANALYSIS

A. Defendants' Motion to Alter or Amend

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[1] The court's Order of October 19, 1995 dismissed "[a]ll of defendants' pending motions for summary judgment on antitrust claims involving Greater Southeast, Johns Hopkins, and United Health Services . . . as moot." Court's Order of October 19, 1995, at ¶ 2. At that time, there were three motions filed by the defendant for summary judgment on plaintiff's antitrust claims: (1) defendants' motion for summary judgment on grounds of immunity under the Health Care Quality Improvement Act; (2) defendants' motion for summary judgment on counts I, II, III, and IV (plaintiff's antitrust claims); and (3) defendants' motion for summary judgment for the absence of antitrust injury.

On October 19, 1995, this court dismissed all of plaintiff's claims against defendants. *See Johnson v. Greater Southeast Hosp. Corp.*, 903 F. Supp. 140, 157-58 (D.D.C. 1995) (dismissing antitrust, civil rights, and tort claims against defendants). With respect to plaintiff's antitrust claims, the court found that plaintiff's claims were not ripe for review because there was no evidence that the peer review process had been completed and that plaintiff's privileges had been terminated. *See id.* at 147-47. Apparently, the court overlooked the fact that plaintiff's privileges at Greater Southeast were revoked on July 8, 1992, on account of plaintiff's "failure to complete outstanding medical records." Letter of July 8, 1992, from Brown to Johnson.[2] Defendants recognized the court's omission of this critical fact, and despite having prevailed under the court's ruling, defendants' dutifully filed this motion to provide this court with the opportunity to correct its ruling.

The purpose of post-judgment motions under Rule 52(b) of the Federal Rules of Civil Procedure is to give the trial court an opportunity to correct manifest errors of law or fact, make additional findings, or take other action that is in the interest of justice. This rule reflects a common understanding in the law that the trial court should be the first recourse for the correction of trial court errors. Accordingly, if it is in the interest of justice that a trial court's ruling be altered or amended, the trial court should be afforded the first opportunity to effect such a modification.

The court's decision to alter or amend, however, should not be dictated either by the impact of its initial ruling, or by the projected consequences of the anticipated modifications. If the errors discovered in its opinion require dramatic revision of its first judgment, a court is not obliged to "remain shackled to that

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[2] David E. Brown, the author of the letter, served as president of Greater Southeast at the time the letter was sent.

judgment," *Nat'l Metal Finishing v. Barclaysamerican/Commercial, Inc.*, 899 F.2d 119, 123 (lst Cir. 1990). Indeed, "[a] party may move to amend the findings of fact even if the modified or additional findings in effect reverse the judgment." *Fontentot v. Mesa Petroleum, Co.*, 791 F.2d 1207, 1219 (5th Cir. 1986).

The decision to alter or amend findings or judgments is committed to the sound discretion of the trial judge. In this case, modification of the court's October 19, 1995 Opinion and Order to reflect the fact that plaintiff's privileges were terminated is of manifest importance. Judge Revercomb's initial dismissal of plaintiff's claims on ripeness grounds in 1990 was reversed and remanded for additional fact-finding on the issue whether plaintiff's membership and privileges at Greater Southeast had in fact been terminated. *See Johnson*, 951 F.2d at 1278. "If so," the court observed, "the district court should proceed to adjudicate [these claims) on the merits." *Id.* On remand, this court determined that plaintiff's antitrust claims had not yet ripened because the peer review process had not been completed. Consequently, this court again dismissed plaintiff's antitrust claims on ripeness grounds. *See Johnson*, 903 F. Supp. at 146-50, 157. However, it is now clear that the termination of plaintiff's hospital privileges in July of 1992 removes any ripeness defect from plaintiff's claims. In light of this revelation, this court must modify its ruling to incorporate this fact and, in accordance with the mandate of the Court of Appeals, proceed on the merits with respect to plaintiff's antitrust claims.

The importance of thorough and accurate fact-finding at the trial court level of the judicial process cannot be overstated. In the words of Judge Jerome Frank:

> The trial judge is the most important agency of the judicial branch of the government precisely because on it rests the responsibility of ascertaining the facts. . .. To ascertain the facts is not a mechanical act. It is a difficult art, not a

> science. It involves skill and judgment. As fact-finding is a human undertaking, it can, of course, never be perfect and infallible. For that very reason every effort should be made to render it as adequate as it humanly can be.

United States v. Forness, 125 F.2d 928, 943 (2d Cir. 1942), *cert. denied*, 316 U.S. 694 (1942). Rule 52(b) ensures the adequacy of fact-finding by providing a trial court the opportunity to cover or clarify the essential factual and legal points so that they might be better understood by the parties and a reviewing court. In this case, the fact that plaintiff's hospital membership and privileges were terminated is clearly relevant to this court's and any subsequent reviewing court's determination as to the justiciability of plaintiff's antitrust claims. Accordingly, defendants' motion to amend this court's findings of fact in the court's October 19, 1995 Memorandum Opinion as they related to the court's discussion of the ripeness of plaintiff's antitrust claims shall be granted.

B. Motions for Summary Judgment

As discussed above, the fact that plaintiff's hospital membership and privileges were terminated in July of 1992 cures plaintiff's claims of any ripeness defect. Accordingly, the court shall, in accordance with the mandate of the Court of Appeals, proceed on the merits with respect to plaintiff's antitrust claims. To do so, however, the court must vacate its Order of October 19, 1995, dismissing as moot all other motions filed by defendants for summary judgment on plaintiff's antitrust claims. Accordingly, the court shall vacate the court's Order of October 19, 1995 dismissing defendants' three motions for summary judgment on plaintiff's antitrust claims – (1) defendants' motion for summary judgment on grounds of immunity under the Health Care Quality Improvement Act; (2) defendants' motion for summary judgment on counts I, II, III, and IV (plaintiff's

antitrust claims); and (3) defendants' motion for summary judgment for the absence of antitrust injury – and address each of these motions seriatim.

C. *Immunity from Damages under the Health Care Quality Improvement Act*

Defendants first move for summary judgment on grounds of immunity under the Health Care Quality Improvement Act of 1986 ("HCQIA"), 42 U.S.C. § 11101-11152 (1988). The HCQIA was designed with two objectives in mind: (1) to provide for effective peer review and interstate monitoring of incompetent physicians and (2) to grant qualified immunity from damages for those physicians and health care officials who participate in peer review activities. *See* 42 U.S.C., § 11101. Under the HCQIA, if a "professional review action" meets certain due process and fairness requirements, then those participating in such review "shall not be liable in damages under *any law of the United States or of any State (or political subdivision) with respect to the action.*" 42 U.S.C. § 11111 (emphasis added). Although this section excludes from its coverage civil rights suits brought under 42 U.S.C. § 1983 or Title VII of the Civil Rights Act of 1964, it clearly applies to antitrust claims.[3] *See Patrick v. Burget*, 486 U.S. 94, 105 n.8 (1988).

Defendants are immune from antitrust damages under the HCQIA if they can demonstrate: "first, that their professional review actions complied with the fairness standards set out in 42 U.S.C. § 11112(a); second, that they satisfied § 11112(b)'s requirement of adequate notice and hearing; third that the hospital reported the results of the professional review action to

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[3] In the Court's Order of October 19, 1995, the court dismissed plaintiff's civil rights claims on other grounds. See *Johnson*, 903 F. Supp. at 150-58.

the state authorities in compliance with [§§ 11131-11134]; and fourth, that the professional review actions commenced on or after November 14, 1986, the effective date of HCQIA." *Austin v. McNamara*, 979 F.2d 728, 733 (9th Cir. 1992).

1. Presumption of Immunity and Standard of Review

"A professional review action shall be presumed to have met the preceding standards necessary for the protection set out in section 11111(a) of this title unless the presumption is rebutted by a preponderance of evidence" to the contrary. 42 U.S.C. § 11111(a). In the context of a summary judgment proceeding, summary judgment is proper if the court finds "no genuine issue of material fact precluding the application of the Health Care Quality Improvement Act of 1986 to this action." *Austin v. McNamara*, 731 F. Supp. 934, 938 (C.D.Cal. 1990); *accord Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) ("Under Rule 56(c), summary judgment is proper 'if the pleadings, depositions, answer to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'"). Thus, to survive summary judgment, plaintiff must demonstrate by a preponderance of the evidence that defendants' professional review process was "unreasonable" and did not meet the standards set out in the HCQIA.[4]

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[4] Judge Revercomb found on a prior occasion in this case that the professional review actions of defendant Kurt Darr, the hearing officer, were immunized by HCQIA. In the Court's Memorandum Opinion of December 11, 1990, Judge Revercomb, in dismissing plaintiff's claim against defendant Kurt Darr, explicitly found that "the specific statutory grant of immunity provided in the Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11101, *et seq.* . . . applies to professional review hearings like the one at issue in this case." Mem. Op. of Dec. 11, 1990, at 6. The Court restated its position on this matter the following day in another Memorandum Opinion, in which the court observed that "plaintiff would have to overcome the

2. Standards Employed by Defendants in Evaluating Plaintiff's Quality of Care

Plaintiff first argues that defendants failed to employ proper standards when reviewing and evaluating plaintiff's medical performance. According to plaintiff, the Joint Commission on Accreditation of Health Care Organizations ("JCAHO") and the American College of Obstetricians and Gynecologists ("ACOG") promulgate minimum operating, hearing, and review standards for all accredited health care organizations, including hospitals. Plaintiff maintains that the JCAHO and ACOG require accredited organizations to incorporate these standards into their organizational bylaws. Plaintiff suggests that defendants' failure to comply with the specific provisions recommended by the JCAHO and ACOG is equivalent to non-compliance with the HCQIA "reasonable belief standard." Pl's Opp. at 2-5.

Contrary to plaintiffs assertion, there is no statutory requirement set forth in the HCQIA that a peer review proceeding must be conducted in accordance with criteria promulgated by the JCAHO, ACOG, or for that matter, even a hospitals own specific internal bylaws or procedures.[5] The standards for professional review actions that are entitled to a grant of qualified immunity under the HCQIA are set forth in section 11112(a) of the Act.

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defendant's *prima facie* showing that the actions at issue are immune from suit" in order to "assert his antitrust and tort claims." Mem. Op. of Dec. 12, 1990, at 11 (footnote omitted). However, because plaintiff's allegations reach beyond the scope of the hearings themselves, and because Judge Revercomb did not provide a thorough explanation for his finding of immunity under the HCQIA, this court shall, for all intents and purposes, approach this issue *de novo*.

[5] Although it appears that defendants conducted the peer review proceedings in accordance with the hospital bylaws, discussed *infra*, the ultimate test for determining whether defendants are entitled to a grant of qualified immunity under the HCQIA is whether the hospital procedures met the standards set forth in the statute.

In order to be held immune from antitrust damages under the HCQIA, defendants must first demonstrate that their professional review actions meet the standards propounded in 42 U.S.C. § 11112(a). Section 11112(a) provides:

> For purposes of the protection set forth in 11111(a) of this title, a professional review action must be taken–
>
> (1) in the reasonable belief that the action was in furtherance of quality health care,
>
> (2) after a reasonable effort to obtain the facts of the matter,
>
> (3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and
>
> (4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirements of paragraph (3).

Id.

Accordingly, in light of the statutory presumption of compliance, the determination whether defendants' peer review process is immune from antitrust claims turns on whether plaintiff can show, by a preponderance of the evidence, that the procedures employed by defendants do not meet the standards set forth in the HCQIA.

Plaintiff alleges non-compliance with the standards set forth in the HCQIA on three separate grounds: (1) defendants failed to meet the "reasonable belief" standard of the HCQIA; (2) defendants made no reasonable efforts to obtain the facts; and (3) the hearing procedures employed by defendants were inadequate. *See* Pl's Opp., at 40-54. Each of these arguments is addressed below.

a. "Reasonable Belief" that Actions were in Furtherance of Quality Health Care.

Plaintiff first argues that defendants' actions were *not* based on a "reasonable belief" that their actions were in furtherance of quality health care. Specifically, plaintiff contends that the statutory presumption of "reasonableness" is overcome because, at the time monitoring agreement was instituted, neither the Medical Staff Executive Committee ("MSEC") nor the *ad hoc* peer review committee, which had been established by the MSEC for the exclusive purpose of investigating this matter, had made an attempt to secure an "objective" evaluation of plaintiff's cases by external, noncompeting physicians. In other words, plaintiff argues that it was unreasonable for defendants to initiate the monitoring program without having plaintiff's case first reviewed by persons other than plaintiff's medical colleagues at Greater Southeast. The statute, however, does not require such a review. After all, the HCQIA is a "peer review" statute in that it protects one's own medical colleagues on the staff of one's own hospital from antitrust claims. Immunity from antitrust claims under the HCQIA would mean very little if only "non-competing" physicians were permitted to be involved in the review process. Presumably, "noncompeting" physicians would not be concerned about exposure to antitrust liability, with the exception of possible exposure to patently frivolous suits.

Plaintiff also contends that the actions taken and the recommendations made by the MSEC, *ad hoc* committee, and eventually, the vote by the Board of Directors to institute termination proceedings were *not* based on a "reasonable belief" that the actions were in furtherance of quality health care. The legislative history of section 11112(a) of the HCQIA indicates that the statute's "reasonableness requirement" was intended to create an objective standard, rather than a subjective good faith standard. *See Austin*, 979 F.2d at 734. According to the House Report on section 11112(a) of the HCQIA:

> Initially, the Committee considered a "good faith" standard . . . . In response to concerns that "good faith" might be misinterpreted as requiring only a test of the subjective state of mind of the physicians conducting the professional review action, the Committee changed to a more objective "reasonable belief" standard. The Committee intends that this test will be satisfied if the reviewers, with the information available to them at the time of the professional review action, would reasonably have concluded that their actions would restrict incompetent behavior or would protect patients.

H.R. Rep. No. 903, 99th Cong., 2d Sess. 10, *reprinted in* 1986 Code Cong. & Admin. News 6287, 6392-93. Thus, as the *Austin* court correctly observes, plaintiff must demonstrate by a preponderance of the evidence that it was unreasonable for the physicians in the defendants' position to believe that their actions were warranted by the facts.

The court finds that the two professional review actions at issue in this case – (1) the institution of the monitoring program by the MSEC, and (2) the vote by the Hospital Board of Directors on October 23, 1989, to institute proceedings to terminate plaintiff's privileges – as well as all the peer review activity related to these professional actions were conducted "in the reasonable belief that the action was in furtherance of quality health care." 42 U.S.C. § 11112(a)(1). The declarations of Drs. Nelson and Turner, and Mr. Chapman's are exemplary in this regard.[6] Dr. Nelson states in his declaration that one of the cases involving Dr. Johnson came to his attention directly as a result

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[6] There is additional evidence not discussed in this opinion that the Board of Director's vote was based on a reasonable belief that its action was in furtherance of quality health care. *See, e.g., Hinman Decl.*, at 3-6; *McCants Decl.*, at 2, 4-6; *Coyle Decl.*, at 2-4.

of having been in an operating room adjacent to an operating room where Dr. Johnson confronted "severe complications of bleeding in one of his patients." *Nelson Decl.*, at 3. Three other cases were brought to Dr. Nelson's attention by the Quality Assurance Department of the hospital because the charts raised "quality of care concerns." *Id.* Three more cases were referred to him by the OB-Neonatal Work Group, "which had made an independent determination that each case raised quality of care concerns." *Id.* Clearly, then, these peer review actions, both of which were initiated by Dr. Nelson, were based on a "reasonable belief that the action was in furtherance of quality health care." 42 U.S.C. § 11112(a) (1) .

Dr. Turner and Mr. Chapman also state unequivocally that it was the quality of Dr. Johnson's patient care that was the driving impetus behind the peer review process. Dr. Turner recalled in his declaration that "it was apparent that there were very serious quality of care concerns related to [Dr. Johnson's] management of potentially life threatening complications in two cases and several other cases where Dr. Johnson had performed major surgery (i.e., Caesarean section and hysterectomy) without adequate indications for surgery." *Turner Decl.* at 4. Similarly, Mr. Chapman noted in his declaration that "I first became aware of the quality of care concerns relating to plaintiff on or about July 3, 1989, when I received a copy of a letter . . . advising Dr. Johnson that based on a review of seven of his cases by an *ad hoc* peer review committee, the Medical Staff Executive Committee (MSEC) had decided to investigate the matter further . . . ." *Chapman Decl.* at 8.

Furthermore, Dr. Johnson himself conceded that the conclusions of the *ad hoc* peer review committee formed to conduct a review of seven of Dr. Johnson's cases – the same conclusion that formed the basis for the Board's vote to initiate proceedings to terminate his privileges – were "not out of line." Transcript of March 22, 1990 Hearing before Kurt Darr, at 42. Indeed, Dr. Johnson testified that these conclusions involved

matters of medical judgment and that the reviewer's criticisms were not uncalled for, ridiculous, "or anything of that nature" – he just happen[ed] to disagree with [them]." *Id.* at 41-42. In light of all the above, it can hardly be maintained that both the two peer review actions and the related peer review activity were motivated by anything other than a "reasonable belief that the action was in furtherance of quality health care ." 42 U.S.C. § 11112 (a) (1).

b. Reasonable Efforts to Obtain the Facts

Plaintiff also contends that defendants made no reasonable efforts to obtain the facts before instituting peer review proceedings. Plaintiff's argument, however, is without support and, in any event, is flatly contradicted by the evidence in this case. As Drs. Nelson and Turner, and Mr. Chapman's declarations make clear, an enormous amount of effort was expended by various physicians in detailing the seven cases, and extended discussions were held regarding Dr. Johnson's patient care before the monitoring agreement was instituted and before the vote was taken to initiate proceedings to terminate Dr. Johnson's privileges. In fact, by the time of the October 23, 1989 vote by the Hospital Board of Directors, the quality of care issues concerning plaintiff has already been reviewed carefully and extensively by the MSEC and the *ad hoc* peer review committee. Indeed, the entire peer review process occurred over a lengthy period of nine months, with multiple meetings at every level of the peer review process within Greater Southeast. Accordingly, the court finds that defendants' peer review proceedings were conducted only after defendants made reasonable efforts to obtain the facts.

c. Adequacy of Hearing Procedures

Defendant also argues that the hearing procedure were inadequate in this case. As an initial matter, plaintiff argues that

the meetings conducted by the MSEC and *ad hoc* peer review committee are not shielded because plaintiff was not given an opportunity to respond to the formal complaint either in writing or orally in a subsequent informal proceeding. However, it is undisputed that plaintiff was sent a letter by the MSEC inviting plaintiff to appear informally at the next scheduled MSEC meeting to discuss the complaint. *See* Letter of July 3, 1989, from Turner to Johnson. Furthermore, the letter enclosed a copy of the written report compiled by the MSEC, and pertinent portions of the Hospital Bylaws detailing the procedure by which the investigation had been conducted by the *ad hoc* committee. Plaintiff therefore has not shown why MSEC and *ad hoc* peer review committee meetings should not be entitled to immunity under the HCQIA.

Defendant also fails to establish by a preponderance of the evidence that defendants' peer review procedures employed during the course of the *termination hearing* were inadequate. Notice requirements for a *proposed professional review action* are deemed to have been met under the HCQIA if the physician has been given notice stating: (1) that a professional review action has been proposed to be taken against the physician; (2) the reasons for the proposed action; (3) that the physician has the right to request a hearing on the proposed action; (4) the time limit within which to request such a hearing; and (5) a summary of the physician's rights in the hearing. *See* 42 U.S.C. § 11112(b). Each of these requirements was met when, following the vote of the Board of Directors at its October 23, 1989 meeting, Chapman, in the capacity of hospital president, notified plaintiff in writing of the Board's vote to initiate proceedings to terminate plaintiff's privileges. *See* Letter of October 24, 1989, from Chapman to Johnson. Chapman's letter not only put plaintiff on notice of defendants' actions, but also set forth the basis for the Board of Director's action. The letter also advised plaintiff of his rights under Hospital Bylaws, including the right to make a demand within 45 days for a hearing. Chapman also

enclosed copies of the pertinent sections of the Bylaws summarizing plaintiff's rights at the hearing. *See id.*

Notice requirements for a *professional review proceeding* (*i.e.* hearing) are deemed to be met if the physician is given notice (1) that states the place, time, and date of the hearing, which is not less than 30 days after the date of the notice and (2) a list of any witness expected to testify at the hearing on behalf of the reviewing body. *See* 42 U. S. C. §§ 11112 (b) (2) (A) - (B) . Both of these requirements were met. Plaintiff was given notice of the place, time, and date of the hearing. Although the hearing occurred more than 30 days after the date of the notice, no objection as to the date of the hearing was raised by plaintiff's counsel. In fact, the dates for the hearing were often set by the agreement of the parties and the hearing officer. *See, e.g.*, Transcript of Feb. 16, 1990 Hearing, at 255; Transcript of March 22, 1990 Hearing, at 251-52. Plaintiff also was provided with a list of the witnesses that were scheduled to appear on behalf of the Hospital by letter dated January 10, 1990.

Moreover, the hearing procedures themselves satisfy the HCQIA due process requirements outlined in 42 U.S.C. §§ 11112 (b)(3)(A)-(C).[7] The hearings were held before an impartial hearing officer who was randomly assigned by the American Arbitration Association. Professor Darr, who served in the capacity of hearing officer, is a lawyer and clearly was not in "direct economic competition" with plaintiff. 42 U.S.C. § 11112 (b)(3)(A)(iii). Plaintiff presumably was represented by the attorney of his choice, and there is no evidence to the contrary. *See* 42 U.S.C. § 11112 (b)(3)(C)(i). There is also no dispute that

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[7] 42 U.S.C. §§ 11112 (b)(3)(C)(v) and 11112 (b)(3)(D) are not implicated in these proceedings because the hearing was never brought to a conclusion by the hearing officer. When plaintiff filed suit in Superior Court against the hearing officer in the midst of the review proceedings and refused to stipulate that the hearing officer would be immune from suit under HCQIA, the hearing officer resigned without bringing the hearing to conclusion. Accordingly, plaintiff's rights that would have come into play following completion of the hearing were never triggered.

a record of the proceeding was made, in accordance with 42 U.S.C. § 11112 (b)(3)(C) (ii), and that copies of the record were available to plaintiff. The hearing transcripts indicate that plaintiff was afforded the right to call, examine, and cross-examine witnesses in accordance with 42 U.S.C. § 11112(b)(3)(C)(iii), and to present evidence determined relevant by the hearing officer. *See* 42 U.S.C. § 1112 (b)(3)(C)(iv) . Because plaintiff fails to meet the burden of demonstrating by a preponderance of the evidence that defendants did not provide adequate hearing procedures, the court finds that the professional review action was taken after "adequate notice and hearing procedures" were afforded to plaintiff. 42 U.S.C. § 11112(a)(3).[8]

3. Reporting Requirements

Plaintiff next argues that defendants are not entitled to a grant of qualified immunity under the HCQIA because they failed to report their actions to the D.C. Board of Medicine. Pl's Opp., at 38-39. Section 11133(c)(1) provides that HCQIA immunity protection will be lost if an entity does not report an adverse action, *but only if* the Secretary [of Health and Human Services] first publishes the name of the entity in the Federal Register pursuant to provisions of section 11111(b) of the Act. Section 11111(b), however, provides important protections to an entity whose immunity under the Act might be in jeopardy, including prior notice to the entity of alleged non-compliance, an opportunity to correct the non-compliance, and an opportunity for a hearing before publication occurs.

Plaintiff bears the burden of showing that each of the

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[8] It should also be noted that the statute does not require absolute adherence to the criteria set forth in the statute. In fact, the statute states explicitly that "[a] professional review body's failure to meet the conditions described in [section 11112(b)] shall not, in itself, constitute failure to meet the standards of [section 11112(a)(3)]." 42 U.S.C. § 11112 (b)(2).

aforementioned elements – prior notice to the entity of alleged non-compliance, an opportunity to correct the non-compliance, and an opportunity for a hearing before publication occurs – has been met, and that publication has occurred. As the Eleventh Circuit stated in *Imperial v. Suburban Hosp. Ass'n. Inc.*, 37 F.3d 1026, 1030 (11th Cir. 1994):

> We need not addresses the question whether [defendant] failed to comply with the reporting requirements imposed by 42 U.S.C. § 11133, because there is no evidence in the record that the Secretary ever made a charge that [defendant] failed to report as required by 42 U.S.C. § 11133. Similarly, there is no evidence that the Secretary conducted the investigation required by 42 U.S.C. § 11111(b) and concluded that [defendant] failed to comply with 42 U.S.C. § 11133. Finally, there is no evidence that [defendant's] name was ever published in the Federal Register pursuant to an adverse finding under 42 U.S.C. § 11111(b). . . . The conditions for a loss of immunity under 42 U.S.C. § 11111(b) are not demonstrated, *and we reject [plaintiff's] argument on this point as frivolous.*

Id. Like the plaintiff in *Imperial*, plaintiff in the instant case fails to demonstrate by a preponderance of the evidence that defendants failed to meet the reporting requirements of the HCQIA, 42 U.S.C. §§ 11133 and 11134.

In sum, the court concludes that both of defendants' professional review actions – the institution of the monitoring program by the MSEC and the vote by the Hospital Board of Directors to terminate plaintiff's privileges – as well as all other professional review activity related to these actions are immune from antitrust liability under the HCQIA, 42 U.S.C. §§ 11101-11152 (1988). Defendants all fall within the § 11151(11)

definition of a "professional review body" that is entitled to immunity under § 11111 (a) (1) (A).[9] Defendants demonstrated that all the statutory requirements for application of HCQIA immunity have been met,[10] thereby triggering the statutory presumption that their professional review activities meet the standards necessary to receive a grant of qualified immunity under the HCQIA. Because plaintiff failed to rebut this presumption by a preponderance of the evidence, the court shall grant defendants' motion for summary judgment on plaintiff's antitrust claims.

D. Unopposed Motions for Summary Judgment on Plaintiff's Antitrust Claims As Alternative Grounds for Dismissal

Even if defendants were not immune from antitrust liability under the HCQIA, the court would grant summary judgment for the defendants on plaintiff's antitrust claims on other grounds. In the court's Order of April 12, 1995, this court granted plaintiff's motion to extend the deadline for filing oppositions to defendants' motions for summary judgment an additional four months until June 11 1995. However, the court made clear in the order that "[t]his date will not be further enlarged." *Id.*

Despite a clear pronouncement from this court that no additional time to respond would be granted, plaintiff neverthe-

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[9] 42 U.S.C. § 11151(11) provides:

> The term "professional review body" means a health care entity and the governing body or any committee of health care entity which conducts professional review activity, and includes any committee of medical staff of such an entity when assisting the governing body in a professional activity."

Id.

[10] Defendants assert and plaintiff does not contest either that the conduct at issue qualifies as a "professional review actions" under the HCQIA, or that the professional review actions occurred on or after November 14, 1986, the effective date of HCQIA.

less failed to oppose the following four motions for summary judgment filed by defendants: (1) motion for summary judgment on counts I, II, III, and IV of the complaint; (2) motion for summary judgment on antitrust claims for the absence of antitrust injury; (3) motion of defendants for summary judgment on civil rights claims; and (4) motion of defendant Edward J. Hinman, M.D., for summary judgment on count VI. Two of these motions – defendants' motion for summary judgment on counts I, II, III, and IV of the complaint, and defendants' motion for summary judgment on antitrust claims for the absence of antitrust injury – seek the dismissal of plaintiff's antitrust claims. Under local Rule 108(b), a court may treat an unopposed motion for summary judgment as conceded by the non-moving party. Accordingly, in the absence of a grant of qualified immunity under the HCQIA, this court would grant as conceded either of defendant's pending motions for summary judgment as to plaintiff's antitrust claims.[11]

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that defendants' motion to amend this court's findings of fact in the court's October 19, 1995 Memorandum Opinion as it relates to the court's discussion of the ripeness of plaintiff's antitrust claims is GRANTED; and it is further

ORDERED that the court's Order of October 19, 1995, dismissing on mootness grounds defendants' motions for summary judgment on antitrust claims against Greater Southeast Community Hospital, Johns Hopkins Health Plan, and United Health Services is VACATED; and it is further

ORDERED that defendants' motion for summary judgment

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[11] Because the immunity motion is fully briefed and ripe, the court has addressed it in light of the general preference for not deciding cases by default, even though this immunity discussion would not be necessary to final resolution of this case.

on grounds of immunity under the Health Care Quality Improvement Act of 1986 is GRANTED; and it is further

ORDERED that plaintiff's antitrust claims involving Greater Southeast Community Hospital, Johns Hopkins Health Plan, and United Health Services contained in Counts I, II, and III of the complaint, are DISMISSED with prejudice.

Accordingly, this entire case now stands DISMISSED.

SO ORDERED.

/s/
Royce C. Lamberth
United States District Judge

DATE: June 24, 1996

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Harold D. Johnson, M.D.,
Plaintiff,

v. Civil Action No. 90-1992
(RCL)

Greater Southeast Community
Hospital Corporation, et al.,
Defendants.

October 19, 1995, Decided
October 19, 1995, FILED

Before: Royce C. Lamberth, United States District Judge

MEMORANDUM OPINION

This case comes before the court on remand from the Circuit Court of Appeals for the District of Columbia. On August 17, 1990, Harold D. Johnson, M.D., an African-American obstetrician-gynecologist, filed a discrimination lawsuit in this court against Greater Southeast Community Hospital of Washington, D.C. ("Greater Southeast" or "Hospital") as well as some individually named defendants. In his complaint, Dr. Johnson set forth a number of antitrust, civil rights, and tort claims involving defendants' alleged conspiracy to terminate his Medical Staff membership and patient privileges at Greater Southeast, Johns Hopkins Health Plan ("Johns Hopkins"), United Health Services, and Columbia Hospital for Women Medical Center ("Columbia Hospital") because of his race. Complete dismissal of this case without prejudice was granted by Judge

Revercomb on December 12, 1990. The court ruled that none of Dr. Johnson's claims were ripe for adjudication because Dr. Johnson had not been officially terminated by Greater Southeast.[1] On December 13, 1991, the D.C. Circuit reversed the dismissal and remanded the case for additional fact-finding on the issue whether plaintiff's membership and privileges had been terminated. *Johnson v. Greater Southeast Community Hosp. Corp.*, 293 U.S. App. D.C. 1, 951 F.2d 1268, 1273 (D.C. Cir. 1991). This court was further instructed to consider plaintiff's claims in the event that they were cured of any ripeness defect. The court now addresses the issues presented on remand.

I. BACKGROUND

Harold D. Johnson, M.D., is a board-certified physician who specializes in obstetrics and gynecology. His relationship with Greater Southeast Community Hospital began with his appointment to the Active Medical Staff of the Hospital in 1981. In addition to Staff membership, the appointment provided Dr. Johnson with hospital privileges that permitted him to present his patients for hospitalization and treatment at Greater Southeast. From 1981 until 1988, Dr. Johnson applied for, and was granted, reappointment to the Active Medical Staff and continued hospital privileges without limitation. In January 1989, however, the Chairman of the Hospital's Department of Obstetrics and Gynecology, Victor Nelson, M.D., reported to the Medical Staff Executive Committee ("MSEC") that he had become aware of some issues related to the quality of health care being received by Dr. Johnson's patients. The MSEC established a six-member ad hoc committee to investigate Dr. Johnson's practice.

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[1] The case was reassigned to the undersigned Judge upon Judge Revercomb's untimely death.

The MSEC completed its investigation on August 14, 1989 and concluded that Dr. Johnson should be subjected to "a severe reprimand, focused review, [and] concurrent monitoring and supervision of surgical cases for a minimum of 24 months." *Johnson v. Greater Southeast Community Hosp. Corp.*, 903 F. Supp. 140, Memorandum Opinion ("Mem. Op.") at 4 (D.D.C. Dec. 12, 1990). Three days later, the Medical Staff President, Odell McCants, M.D., notified Dr. Johnson that the MSEC's recommendation would be reviewed by the Hospital Board of Directors, but that in the meantime, the MSEC had placed Dr. Johnson on summary suspension.

An informal hearing before the MSEC to discuss the summary suspension issue was held on August 21, 1989. At the hearing, the MSEC asked Dr. Johnson if he would be willing to accept the MSEC's recommendation for close monitoring and supervision. Dr. Johnson indicated that he would, and signed an agreement setting forth the terms of the monitoring and supervision program on August 23, 1989. Following the signing of the agreement, the MSEC rescinded Dr. Johnson's summary suspension. After further review and approval of the MSEC's actions by both the Hospital Board of Directors and the Board's Quality Assurance Committee, the Board of Directors convened to render a final decision regarding Dr. Johnson's case on October 19 and 23, 1989. At some point during September 1989, Dr. Johnson submitted an application to Greater Southeast for reappointment to the Active Medical Staff for the 1990-91 cycle. The Hospital took no action on the reappointment application.

During the October meetings, the Board considered two courses of action. The first option considered was to retain Dr. Johnson on the Medical Staff subject to the 24-month monitoring and supervision program. The Board, however, chose to exercise the second option of terminating Dr. Johnson's membership and medical privileges altogether. Nevertheless, Dr. Johnson was allowed to continue his practice subject to the monitoring and

supervision agreement while he pursued any hearing or appeal rights pursuant to the Hospital's by-laws. On October 24, 1989, the President of the Hospital, Thomas Chapman, informed Dr. Johnson of the Board's decision to terminate his privileges, and indicated that Dr. Johnson would have forty-five days in which to request a formal hearing. Chapman also conveyed to Dr. Johnson the Board's determination that "pending your decision concerning a formal hearing, and during any hearing proceedings, your Medical Staff membership and privileges may continue under the monitoring agreement you signed on August 23, 1989." *Id.* at 6.

Dr. Johnson requested a formal hearing on the matter. Kurt Darr was appointed Hearing Officer, and hearings were conducted on February 15 and 16, 1990. The hearings were scheduled to resume on March 22, 1990. On March 21, 1990, Dr. Johnson filed an action for breach of contract against Darr in the Superior Court of the District of Columbia, alleging that Darr's decision, in his capacity as Hearing Officer, to permit the Hospital to call an independent expert witness violated the Hospital's bylaws. Dr. Johnson's request for immediate injunctive relief was denied, and the hearing continued on the next day as planned. However, the case against Darr remained pending in Superior Court.

The final day of hearings was scheduled for April 5, 1990. However, Darr notified the parties an April 4 that he would not complete the hearing until the lawsuit in Superior Court was resolved. On April 18, 1995, Dr. Johnson served each member of the Hospital Board of Directors with a brief requesting that the Board reconsider its decision to terminate his Medical Staff membership and privileges. The Board voted to refrain from making any final decision regarding Dr. Johnson's status at the Hospital until the completion of the hearings and the filing of the Hearing Officer's report.

On May 8, 1990, the Superior Court dismissed Dr. Johnson's lawsuit against Darr as unripe. Darr nevertheless refused

to continue the administrative proceedings until the parties stipulated that the proceedings were covered by the immunity provisions of the Health Care Quality Improvement Act of 1986, 42 U.S.C.A. § 11111 (1988) ("HCQIA"). Although the Hospital agreed to stipulate, Dr. Johnson refused. Darr subsequently resigned as Hearing Officer on August 2, 1990.

Prior to Darr's formal resignation Dr. Johnson applied for reappointment to the Courtesy Staff of Columbia Hospital. As part of the reviewing procedure, Columbia Hospital requested that Greater Southeast forward copies of the patient histories at issue during Greater Southeast's investigation of Dr. Johnson's practice along with a questionnaire completed by Dr. Nelson. Dr. Johnson submitted Columbia Hospital's request to Dr. Nelson by certified mail. According to Dr. Johnson, Dr. Nelson failed to respond promptly, which resulted in the temporary suspension of his privileges at Columbia Hospital.

On August 10, 1990, Greater Southeast contacted Dr. Johnson through counsel to determine how he wished to proceed in light of the Hearing Officer's resignation. The Hospital proposed that the existing hearing record be submitted to the Board so that the Board might make a final determination as to Dr. Johnson's status at Greater Southeast. Dr. Johnson responded by filing this lawsuit on August 17, 1990.

In his complaint, Dr. Johnson alleged a number of antitrust, civil rights, and tort violations.[2] Dr. Johnson's antitrust claims

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[2] Dr. Johnson's claims were filed against Greater Southeast as well as individually named defendants. At the time of the filing of the complaint, plaintiff had separated the individually named defendants into two classes. The first class - "Individual Non-Medical Defendants" - included: Thomas Chapman, President of the Greater Southeast Community Hospital; Raymond Turner, M.D., President for Medical Affairs; Mary Lou Meyers, Vice President and General Counsel of Greater Southeast. Complaint P 12. The second class of defendants -"Individual Medical Defendants" - included: Mahmood Mohamadi, M.D., Chairman of the Credentials Committee and member of the Hospital Board of Directors; Odell McCants, M.D., President of the Medical Staff; Victor Nelson, M.D. Chairman of the Department of Obstetrics and Gynecology; William R. Coyle, M.D., member of the Department

are all rooted in the allegation that the Hospital and certain named defendants conspired to remove him from the existing market of obstetricians by: (1) terminating his Medical Staff membership and privileges at Greater Southeast; (2) precluding him from gaining privileges at Johns Hopkins and United Health Services; and (3) interfering with his reappointment at Columbia Hospital. Dr. Johnson maintained that these actions constituted a clear restraint on trade and commerce in inpatient obstetrical services in violation of §§ 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1, 2 (1988), and the comparable provisions of the District of Columbia Code, D.C. Code Ann. §§ 28-4502, 28-4503 (1981).

Dr. Johnson also alleged a series of civil rights violations. Dr. Johnson claimed that the defendants refused to contract with him on racially neutral grounds, in violation of the Civil Rights Act of 1866, 42 U.S.C. § 1981 and the Civil Rights Act of 1871, 42 U.S.C. § 1985. In addition, Dr. Johnson claimed that the defendants unlawfully discriminated against him in the terms, conditions, and privileges of his employment, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e and the District of Columbia Human Rights Act, D.C. Code § 1-2512 (1981), by their refusal to grant him unrestricted Medical Staff membership and hospital privileges, and their failure to act on his 1989 reappointment application.

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of Obstetrics and Gynecology; and Gail Van Wingerden, M.D., member the Department of Obstetrics and Gynecology. Complaint P 14. One final defendant – Edward Hinman, member of the Hospital Board of Directors – was not classified. Complaint P 13.

Since the initiation of this suit, plaintiff's claims against Mr. Darr, Dr. Mohamadi, and Dr. Van Wingerden have been dismissed. Plaintiff's antitrust claims remain pending against Greater Southeast and all remaining defendants. Complaint PP 43, 47, 50. Plaintiff's civil rights were originally filed and remain pending against Greater Southeast, and individual defendants Chapman, Turner, Mayers, Hinman, McCants, and Nelson. Complaint PP 56, 61. Plaintiff's claim of tortious inducement to breach was originally filed and remains pending only against defendant Hinman. Complaint P 67.

Finally, Dr. Johnson claimed that Dr. Edward Hinman, the principal advocate for termination of Dr. Johnson's membership and privileges at Greater Southeast, violated the common law of the District of Columbia when he tortiously induced the Hospital to breach its appointment contract with him by terminating his Staff membership and hospital privileges.

Defendants first moved for dismissal and, in the alternative, for summary judgment on all of Dr. Johnson's claims primarily on the grounds that the claims were not ripe for adjudication because the Hospital had not completed its administrative termination proceedings. Dr. Johnson then moved for summary judgment on the civil rights claims, arguing that the defendants had failed to meet the burden of articulating a legitimate, non-discriminatory reason that would explain their collective actions against him. The district court denied plaintiff's motion for summary judgment on his civil rights claims and granted defendant's motion to dismiss all claims based on a finding that "because plaintiff's privileges and membership at the hospital remain intact, subject to the monitoring program agreed to by the plaintiff, the plaintiff has suffered no injury which is ripe for judicial consideration at this time under either antitrust law, civil rights law, or in tort."[3] Mem. Op. at 10.

Dr. Johnson appealed the dismissal of his lawsuit and the denial of his motion for partial summary judgment on the civil rights claims. The D.C. Circuit reversed this court's dismissal of Dr. Johnson's case and remanded it for additional fact-finding on the issue whether Dr. Johnson's membership and privileges were in fact terminated at the time of the appeal. The court also instructed this court to consider any of Dr. Johnson's claims that

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[3] The court rejected plaintiff's argument that the terms of the monitoring and supervision agreement constituted "injury" based on a finding that plaintiff had entered into the agreement voluntarily and that plaintiff had demonstrated neither temporary nor permanent damage to his practice as a result of compliance with the agreement. See Mem. Op., at 9.

did not suffer a ripeness defect.[4]

II. DISCUSSION

A. Ripeness: Antitrust Claims

The Court of Appeals remanded the case to the district court for "additional fact-finding on the key jurisdictional fact of whether appellant's Medical Staff membership and privileges at the Hospital have been terminated." *See Johnson*, 951 F.2d at 1273. The D.C. Circuit was concerned that plaintiff's privileges, although intact at the time of the court's dismissal of plaintiff's case, might have terminated with the expiration of the monitoring and supervising agreement. "If they have, [plaintiff's] claims of injury stemming from his termination no longer suffer any ripeness defect and the court should go on to consider them on the merits." *Id.* (footnote omitted). The D.C. Circuit held that plaintiff's civil rights claims did not suffer any ripeness defect and instructed the court to proceed directly with consideration of these claims. However, the court reserved judgment as to the ripeness of defendant's antitrust claims. This court therefore begins with an inquiry into whether plaintiff's antitrust claims still suffer a ripeness defect.

Questions of ripeness "go to the power of the federal courts to entertain disputes, and to the wisdom of their doing so." *Renne v. Geary*, 501 U.S. 312, 316, 115 L. Ed., 2d 288, 111 S. Ct. 2331 (1991). In *Abbott Lab. v. Gardner*, 387 U.S. 136, 18 L. Ed. 2d 681, 87 S. Ct. 1507 (1967), the Supreme Court set forth a practical formula for the resolution of ripeness questions. According to the Court, questions of ripeness turn on "the fitness

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[4] The D.C. Circuit declined to rule on the district court's denial of Dr. Johnson's motion for summary judgment because a court ordered denial of a summary judgment motion is not appealable. *See Johnson*, 951 F.2d at 1270.

of the issues for judicial decisions" and "the hardship to the parties of withholding consideration." *Id.* at 149. The ripeness inquiry involves a balancing of the interests of the party seeking relief from an alleged or perceived injury with the court's interest in postponing review until the question arises in a more concrete fashion. Ripeness issues, by their very nature, require a subtle and subjective assessment. As the D.C. Circuit noted in *Continental Airlines, Inc. v. Civil Aeronautics Bd.*, 173 U.S. App. D.C. 1, 522 F.2d 107 (D.C. Cir. 1975) "The law of ripeness, once a tangle of special rules and legalistic distinctions, is now very much a matter of common sense." 522 F.2d at 124. The court went on to remark: "We do not pretend that the science of assessing an issue's ripeness is an exact one." *Id.* at 128.

The ripeness doctrine derives ultimately from the requirement in Article III of the United States Constitution that federal courts decide only cases and controversies. As the D.C. Circuit aptly pointed out in *DKT Memorial Fund Ltd. v. Agency for Int'l Dev.*, 281 U.S. App. D.C. 47, 887 F.2d 275 (D.C. Cir. 1989), "'the question of ripeness goes to our subject matter jurisdiction 887 F.2d at 298 (quoting *Duke City Lumber Co. v. Butz*, 176 U.S. App. D.C. 218, 539 F.2d 220, 221 n.2 (D.C. Cir. 1976)). If a claim is unripe, federal courts lack subject matter jurisdiction and the complaint must be dismissed, *See S. Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 502 (9th Cir. 1991). The question of ripeness is of such importance that federal courts are required to raise it *sua sponte* even though the parties do not. *See, e.g., Nationwide Mut. Ins. Co. v. Cisneros*, 52 F.3d 1351, 1361 (6th 1995) *Cinel v. Connick*, 15 F.3d 1338, 1341 (5th Cir. 1994); *Acierno v. Mitchell*, 6 F.3d 970, 974 (3rd Cir. 1993); *Volvo N. Amer. Corp. v. Men's Int'l Prof. Tennis Council*, 857 F.2d 55, 63 (2nd Cir. 1988).

There is clear precedent for dismissal of antitrust claims on ripeness grounds. *See, e.g., Unity Ventures v. Lake County*, 841 F.2d 770 (7th Cir. 1987), *cert. denied*, 488 U.S. 891, 102 L. Ed. 2d 216, 109 S. Ct., 226 (1988); *Suburban Trails, Inc. v. New*

Jersey Transit Corp., 800 F.2d 361 (3rd Cir. 1986); *United States Steel Workers v. U.S. Steel Corp.*, 492 F. Supp. 1 (N.D. Ohio 1980). Furthermore, there is considerable precedent for dismissal of antitrust claims where the plaintiff has commenced a suit in federal court prior to completion of a hospital's internal peer review procedures. In *Cooper v. Amster*, 645 F. Supp. 46 (E.D. Pa. 1986), aff'd, 845 F.2d 1010 (3rd Cir.), *cert. denied*, 488 U.S. 852, 102 L. Ed. 2d 110, 109 S. Ct. 138 (1988), a physician claimed that two hospitals and three physicians violated § 1 of the Sherman Act by failing to refer emergency patients to him. The court, in dismissing plaintiff's action for lack of jurisdiction, stated: "It is little enough to ask that plaintiff get a definitive no from the hospital before he comes to court for an injunction, treble damages, and the whole panoply of Sherman Act relief." *Id.* at 47. In *Colorado Chiropractic Council v. Porter Memorial Hosp.*, 650 F. Supp. 231 (D. Colo. 1986), a group of chiropractors and several hospitals demanded $20 million in damages under antitrust laws for defendant's failure to grant them hospital privileges. The court dismissed plaintiff's claim as "remote and speculative and not ripe for adjudication." *Id.* at 236. Similarly, in *Hendrix v. Poonai*, 662 F.2d 719 (11th Cir. 1988), hospital officials sought a declaratory judgment that the hospital would be immune from antitrust claims if it were to deny a physician's pending application for readmission to staff membership. In affirming the district court's dismissal of the claim, the Eleventh Circuit noted that "in this case, the federal courts can become involved, if at all, only after the decision is made to deny Dr. P.V. Poonai's readmission application." *Id.* at 722.

In the judgment of this court, plaintiff's antitrust claims simply are not ripe for review. Plaintiff asserts that he was injured by the termination of his hospital membership and privileges. However, there is no evidence that plaintiff's membership and privileges have in fact been terminated. It is undisputed that as of August 23, 1989, plaintiff retained his

Active Medical Staff membership and full hospital privileges at Greater Southeast, subject only to administrative monitoring and supervision of his surgical cases as set forth in the agreement signed by the plaintiff on that day. It is equally undisputed that immediately before and during the arbitration hearing, Dr. Johnson retained his Medical Staff membership and privileges. Plaintiff was notified by the President of the Hospital of the Board's determination that "pending your decision concerning a formal hearing, and during any hearing proceedings, your Medical Staff membership may continue under the monitoring agreement you signed on August 23, 1989." Letter of Thomas Chapman to Plaintiff of Oct. 24, 1989 (emphasis added). Plaintiff displayed similar knowledge of his continuing privileges in his request for an arbitration hearing: "This notice is submitted with the understanding that Dr. Johnson will retain his medical privileges at the Greater Southeast Community Hospital until such time as the termination proceedings are concluded and there has been a final decision on the proposed termination." Letter from Plaintiff to Thomas Chapman of Dec. 6, 1989. The arbitration hearing in which the termination issue was being discussed stalled midstream with the resignation of the Hearing Officer, Kurt Darr. No official recommendation was made by Darr as to whether plaintiff's membership and privileges should or should not be terminated. In the absence of a definitive recommendation, the Hospital Board of Directors has refused to make a final decision to terminate Dr. Johnson's membership and privileges. It is clear, then, that plaintiff's Medical Staff membership and hospital privileges remain in effect.

Plaintiff contends that his Staff membership and hospital privileges expired by operation of law on August 23, 1991 when the Hospital failed to grant or deny his application for reappointment to the Medical Staff within the 120-day period prescribed by D.C. Code Ann. § 32-1307(f) (1981) following the termination of the monitoring and supervision agreement. Plaintiff's argument, however, misconstrues the statutory provision.

Nowhere does § 32-1307(f) indicate, let alone suggest, that a health professional's staff membership or clinical privileges automatically terminate following the expiration of the 120-day period. Section 32-1307(f) regulates appointment applications and the speed at which applications for reappointment are to be acted upon. The provision imposes on the hospital an obligation to act on an application within 120 days. To invoke § 32-1307(f), plaintiff must submit an application for reappointment and provide evidence that the hospital failed to act on the application within 120 days. Following the expiration of the 120-day period, plaintiff would be able to file suit under the statute to enforce hospital review of the pending application, and, if successful, plaintiff would be entitled to an appointment to the Medical Staff.

Section 32-1307(f) appears wholly inapplicable to the present proceedings. The expiration of plaintiff's monitoring and supervision agreement with the hospital cannot be said to trigger § 32-1307(f). When plaintiff's monitoring and supervision agreement expired, plaintiff returned to full and unencumbered membership and privilege status. In accordance with the letter sent by the President of the Hospital, plaintiff's membership and privileges were intended to remain at this level until the termination of the administrative proceedings. The court therefore finds that plaintiff's Medical Staff membership and privileges were terminated neither by administrative proceeding nor by operation of law.

The gravamen of Dr. Johnson's alleged injury is that he was unable to present patients for treatment at the hospital. Dr. Johnson has provided no evidence whatsoever that this ever occurred. At no point has Dr. Johnson indicated that he presented a patient for treatment that was summarily turned away from Greater Southeast. Where a physician officially retains his hospital privileges and, consequently, his ability to admit patients to the hospital, the physician cannot sustain a claim of injury based solely on the allegation that he would not be

permitted to exercise his privileges if he had wished to do so. Plaintiff must do more than speculate. At a minimum, plaintiff must show some failed attempt to exercise his privileges. Dr. Johnson never presented a patient for treatment at the Greater Southeast during this period. Had Dr. Johnson done so, and been unable to secure the patient's admittance to the hospital, there is little doubt that this would constitute actionable harm. However, the court will not infer injury in the absence of such an evidentiary showing. Since plaintiff still has the ability to admit patients to the hospital, the significance of the antitrust claims in terms of actual damages or ability to prove damages evaporates. In light of plaintiff's failure to make a sufficient showing of injury, the court finds plaintiff's antitrust claims unripe for review and therefore not justiciable in federal court. Accordingly, plaintiff's antitrust claims under the Sherman Act, with respect to his Staff membership and hospital privileges as Greater Southeast, shall be dismissed for lack of jurisdiction.[5]

Plaintiff also alleged that defendants conspired to preclude his membership in the Johns Hopkins Health Plan and United Health Services, and to interfere with his application to the Courtesy Staff at Columbia Hospital. The D.C. Circuit correctly pointed out that if plaintiff were able to prove such a conspiracy, plaintiff would be entitled to damages under § 4 of the Clayton Act, regardless of whether plaintiff's membership and privileges had been terminated at Greater Southeast. *See Johnson*, 951 F.2d at 1275.

Plaintiff bears the burden of pleading and proving an illegal conspiracy under the Sherman Act. To do so, plaintiff must: (1) demonstrate that each defendant made a conscious commitment to an illegal conspiracy; (2) present competent evidence that each

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[5] In light of the court's dismissal of plaintiff's antitrust claims with respect to plaintiff's membership and privileges at Greater Southeast, on ripeness grounds, the court also shall deny all of defendant's pending motions for summary judgment on this issue as moot.

defendant took acts in furtherance of that conspiracy; and (3) make a showing that the conspiracy was the proximate cause of antitrust injury to the plaintiff. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986); *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984); *Cooper v. Forsyth County Hosp. Auth., In.*, 789 F.2d 278 (4th Cir. 1985), cert. denied, 479 U.S. 972, 93 L. Ed. 2d 418, 107 S. Ct. 474 (1986).

Plaintiff alleged in his complaint that defendants conspired to preclude his membership from Johns Hopkins and United Health Services. In July 1989, Greater Southeast entered into an exclusive agreement with Johns Hopkins to provide in-patient services to the Plan's subscribers in the District of Columbia. At the same time, Greater Southeast entered into a separate agreement with United Health Services, an affiliate of Greater Southeast, to offer prepaid health care services to members of Johns Hopkins. In September 1989, plaintiff's applications for membership in the Johns Hopkins and in United Health Services were denied on quality of patient care grounds.

The D. C. Circuit construed plaintiff's pleadings on this matter as alleging a separate conspiracy – that is, in addition to conspiring to preclude plaintiff's membership and privileges from Greater Southeast, defendants also conspired to prevent plaintiff from being able to contract with Johns Hopkins and United Health Services. Plaintiff's pleadings, however, plainly indicate that the allegations regarding Johns Hopkins and United Health Services were intended to serve as examples of acts "in furtherance of said combination and conspiracy [to boycott plaintiff from maintaining Medical Staff membership and privileges at Greater Southeast]" and were not intended to allege a separate conspiracy. Complaint p. 45. Plaintiff therefore did not allege a separate antitrust claim regarding Johns Hopkins and United Health Services, but rather supported his existing antitrust claims with evidence of the denial of his application to these two

Plans. The court, however, has dismissed as unripe the antitrust claims that this evidence was intended to support. Accordingly, the court need not consider the evidence of the denial of plaintiff's applications any further.

It should be noted, however, that if plaintiff had intended alleged a separate conspiracy, he has provided little, if any, evidence in support of it. Plaintiff provided no evidence that any defendant made a conscious commitment to such a conspiracy. Moreover, plaintiff made no showing that defendants' conduct was linked in any way to the Johns Hopkins and United Health Services appointment decisions. In fact, plaintiff fails to allege that defendant engaged in any conduct whatsoever with respect to Johns Hopkins and the United Health Services. The court therefore finds in the alternative that, if plaintiff's allegations regarding the appointment decisions made by Johns Hopkins and United Health Services were intended to constitute a separate antitrust claim, defendants would be entitled to summary judgment because plaintiff failed to make a sufficient showing that defendants in fact conspired to preclude plaintiff from obtaining membership in Johns Hopkins and United Health Services.

Plaintiff also alleged in his complaint that defendants conspired to interfere with defendant's application for reappointment at Columbia Hospital. According to plaintiff, the Credentials Committee of Columbia Hospital asked plaintiff to secure a completed questionnaire from the Chief of Obstetrics and Gynecology at each hospital at which he had privileges. Plaintiff provided the questionnaire to defendant Nelson and alleges that defendant Nelson failed to return the questionnaire in a timely fashion. Plaintiff contends that he suffered antitrust injury as a result.

The facts, as set forth in plaintiff's complaint, fail to properly allege an antitrust conspiracy. As an initial matter, it is unclear under plaintiff's recitation of the facts whether any other defendants conspired with Dr. Nelson to delay Dr. Nelson's

response. Plaintiff provided no evidence that the other defendants were aware of Dr. Nelson's conduct or that each of them had made conscious commitment to support Dr. Nelson in that regard. Moreover, plaintiff's alleged conspiracy implicated the conduct of only one of the defendants. Plaintiff made his request to the Chief of the Obstetrics and Gynecology department, and it was the Chief of the department that delayed in his response. Plaintiff simply has not demonstrated that any defendant other than Dr. Nelson engaged in conduct in furtherance of the alleged conspiracy. Thus, plaintiff also failed to make a sufficient showing of multiplicity to sustain his conspiracy allegations. Accordingly, the court shall grant defendants' motion for summary judgment dismissing plaintiff's claims involving Columbia Hospital.[6]

B. Civil Rights Claims

Defendants filed a number of dispositive motions during may of 1993, including a motion for summary judgment on plaintiff's civil rights claims.[7] Thereafter, the parties became mired in discovery disputes. In the meantime, plaintiff filed a motion to stay the briefing schedule so that he could continue

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[6] It should be noted that, even if plaintiff's antitrust claims were ripe for adjudication, the court would nevertheless be compelled to grant defendants' motion for summary judgment on all antitrust claims because plaintiff did not oppose any of them, except for defendants' motion for summary judgment on the grounds of HCQIA immunity. Although plaintiff opposed defendants' original motion for summary judgment, which was filed prior to the appeal, plaintiff did not oppose any of defendants' subsequent motions for summary judgment on all antitrust claims filed after the case was remanded to this court for further proceedings. Under local Rule 108(b), a court may treat an unopposed motion for summary judgment as conceded by the non-moving party.

[7] During this time, defendants also filed motions for summary judgment on the antitrust claims and a motion for summary judgment on plaintiff's claims against defendant Hinman.

discovery. On January 31, 1995, the court denied plaintiff's motion to stay the briefing schedule and advised plaintiff that he would have 30 days from the date of the court's Order in which to file oppositions to defendants' dispositive motions; otherwise, the court would treat defendants' motions as conceded.

The following week, plaintiff filed a motion for reconsideration and for extension of time. Plaintiff's counsel indicated that, due to ongoing and incomplete discovery and the press of litigation in other cases, she would be unable to meet the court ordered filing deadline. In a court Order dated April 12, 1995, the court granted plaintiff's motion to extend the deadline for filing oppositions an additional four months until June 1, 1995. However, the court made clear in the Order that "this date will not be further enlarged." *Id.*

Despite a clear pronouncement from this court that no additional time to respond would be granted, plaintiff failed to oppose four of defendants' motions for summary judgment by the June 1, 1995 deadline.[8] On June 2, 1995, plaintiff filed a motion for a trifurcated briefing schedule and an enlargement of time in which to file his opposition. Two weeks later, plaintiff filed a motion for leave to file an opposition to defendants' motion for summary judgment on the civil rights claims, out of time. Plaintiff's counsel reiterated many of the same arguments asserted in her previous request for extension of time, including the press of litigation in other cases. Plaintiff's counsel also indicated that the briefing schedule set up by the court placed "an unfair burden" upon plaintiff and plaintiff's counsel to require an "instantaneous response" to defendant's motions. Plaintiff's

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[8] These four motions were: Motion of Defendants for Summary Judgment on Counts I, II, III, and IV of the Complaint; Motion for Defendants for Summary Judgment on Antitrust Claims For The Absence of Antitrust Injury; Motion of Defendants For Summary Judgment on Civil Rights Claims; and Motion of Defendant Edward J. Hinman, M.D., For Summary Judgment on Count VI.

counsel therefore requested leave of court to file plaintiff's oppositions out of time.

Plaintiff's contention that the Order required an "instantaneous response" is completely unfounded. All of defendants' motions for summary judgment, including defendants' motion for summary judgment on plaintiff's civil rights claims, had been pending before this court for nearly two years when plaintiff's June 1, 1995 due date expired. Plaintiff was served with defendants' motion for summary judgment on the civil rights claims on April 27, 1993, and from that point forward, was in a position to prepare a response. Moreover, even if plaintiff had ignored the defendants' motion when it was served, plaintiff was made aware of the need to respond to the motion five months prior to the June 1, 1995 deadline in the Court's January 31, 1995 Memorandum Opinion.

What is more disturbing about plaintiff's argument, however, is his claim that the June 1, 1995 deadline set forth in the April 12, 1995 Order is "an unfair burden" on plaintiff and plaintiff's counsel. Plaintiff seems to have forgotten that the April 12, 1995 Order granted plaintiff's request for an extension of time, and that the June 1, 1995 due date, which plaintiff now decries as "an unfair burden," was a date selected and requested by plaintiff. In plaintiff's own words:

> Plaintiff Harold D. Johnson, M.D., hereby moves this Court for 90-day enlargement of time, to and including June 1 1995, in which to respond to Defendant's motions for summary judgment in this proceeding.

Plaintiff's Feb. 7, 1995 Mot. Enlarg. Time, at 1 (emphasis added). The court's April 12, 1995 Order provided the exact relief sought by plaintiff. It is simply preposterous that plaintiff now claims that this relief is an "unfair burden" imposed on him by this court.

Plaintiff has had more than ample time to prepare oppositions to defendants' dispositive motions, including the motion for summary judgment on civil rights claims. Plaintiff was served with defendants' motion for summary judgment on civil rights claims over two years ago. Since then, plaintiff has had a substantial opportunity to prepare an opposition. Moreover, even if plaintiff had not prepared an opposition before 1995, this court by its January 31, 1995 Order made plaintiff aware of the need to respond to defendants' motion. Furthermore, plaintiff's request for an additional extension until June 1, 1995 to file an opposition to defendants' motion was granted. The latter Order cannot be construed as placing "an unfair burden" on plaintiff now that plaintiff failed to meet his own filing deadline. The court made clear in the Order that no more extensions would be granted. Accordingly, the court shall deny both plaintiff's motion for a trifurcated briefing schedule and enlargement of time, and plaintiff's motion for leave to file out of time an opposition to defendants' motion for summary judgment on civil rights claims.[9]

The court shall grant Defendant's unopposed motion for summary judgment dismissing on all civil rights claims as conceded pursuant to local Rule 108(b). Moreover, for the reasons set forth below, the court would be compelled to grant defendants' motion for summary judgment on the civil rights claims even if defendants' motion was not treated as conceded.

1. Claims Under the Civil Rights Acts of 1866 and 1871

Plaintiff alleged that the defendants refused to contract with

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[9] In light of the court's denial of plaintiff's motion to file out of time, defendants' motion to strike plaintiff's late submissions on the civil rights issue is denied as moot.

him on racially neutral grounds, in violation of the Civil Rights Act of 1866, 42 U.S.C. § 1981, and the Civil Rights Act of 1871, 42 U.S.C. § 1985. Under the facts of this case, however, plaintiff fails to state a claim under either § 1981 or § 1985. The determinative issue with respect to plaintiff's § 1981 claim is whether the defendants' conduct violates federal rights secured by the Civil Rights Act of 1866, 42 U.S.C. § 1981. Section 1981 provides in pertinent part as follows:

> Any persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, . . as is enjoyed by white citizens . . . .

Id. at § 1981(a). The scope of this provision was recently addressed by the Supreme Court in *Patterson v. McLean Credit Union*, 491 U.S. 164, 105 L. Ed. 2d 132, 109 S. Ct. 2363 (1989). In *Patterson*, a black woman had been employed for 10 years as a teller and file coordinator at a credit union until she was laid off. She then filed a § 1981 lawsuit alleging that her employer harassed her, failed to promote her to the position of accounting clerk, and then discharged her, all due to her race. The Court affirmed the lower court's ruling that racial harassment was not actionable under § 1981 because the provision expressly prohibits discrimination only in the making and enforcement of contracts. The provision does not apply to conduct which occurs after the formation of a contract and which does not interfere with the right to enforce established contractual obligations. *See id.* at 170. The Court stated:

> The statute prohibits, when based on race, the refusal to enter into a contract with someone, as well as the offer to make a contract, only on discriminatory terms. But the right does not extend, as a matter of either logic or semantics, to conduct by

> the employer after the contract relation has been established, including breach of the terms of the contract or imposition of discriminatory working conditions. Such postformation conduct does not involve the right to make a contract.

Id. at 176-77. The D. C. Circuit expressly adopted the Patterson decision in *Gersman v. Group Health Ass'n. Inc.*, 289 U.S. App. D.C. 332, 931 F.2d 1565 (D.C. Cir. 1991), vacated and remanded, 502 U.S. 1068, 117 L. Ed. 2d 127, 112 S. Ct. 960, aff'd on remand, 975 F.2d 886 (D.C. Cir. 1992).[10] In *Gersman*, the D.C. Circuit addressed the issue whether allegations of "failure to renew" satisfy a plaintiff's need to demonstrate a "refusal to contract" under § 1981. Plaintiff argued that the parties were free to modify the price term under the existing contract, and defendants' alleged failure to consider a new price structure constituted a refusal to contract under § 1981. The court, however, observed that § 1981 is only applicable when a new contractual relationship is contemplated. Contract modification, by contrast, is governed by the existing contract. Thus, defendant's actions, which resulted in the termination of the contractual relationship, were not actionable under § 1981. *See* 931 F.2d at 1573. In dismissing plaintiff's § 1981 claim, the Gersman court stated:

> We agree with the majority of Circuits who have held that, under *Patterson*, § 1981 does not apply to contract terminations. We find this conclusion

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[10] The Supreme Court granted certiorari, but did not reach the merits of the decision. It simply vacated the judgment and remanded the case to the Court of Appeals for consideration of what impact the newly enacted Civil Rights Act of 1991 might have on the decision. In *Gersman* II, the court affirmed the district court's dismissal of plaintiff's § 1981 claims based on the *Patterson* decision. 975 F.2d 886, 887 (D.C. Cir. 1992).

> appropriate in terms of the language of both § 1981 and the Patterson opinion. The Court was clear in stating that § 1981 does not apply to conduct which occurs after the formation of a contract and which does not interfere with the right to enforce established contract obligations.

Id. at 1571 (citation omitted).

Dr. Johnson's § 1981 claim is analogous to plaintiff's claim in *Gersman*. The claim is styled as a refusal "to enter into a contract with plaintiff on racially neutral terms" and a refusal "to allow plaintiff to contract with defendant Hospital on the same basis as white' physicians were permitted to contract." Complaint, pp. 56 and 57. However, it is clear from plaintiff's recital of the facts that the conduct at issue occurred after the formation of plaintiff's appointment contract with Greater Southeast.

Plaintiff alleged that he had a continuing contractual relationship with Greater Southeast for nearly a decade. "From 1981 until 1988, he [plaintiff] applied for, and was granted, reappointment to the Active Medical Staff without limitation or incident." Complaint p. 22. Defendants supposedly violated § 1981 when they modified plaintiff's hospital privileges by requiring him to comply with the monitoring and supervision program and when defendants allegedly failed to take action on plaintiff's 1989 application for reappointment, *see* Complaint PP 23, 30. However, Defendants' conduct in both instances is clearly postformation, and as such, is simply not actionable under § 1981. Patterson recognized the existence of a new contractual relationship only where there is a "new and distinct relation between employee and the employer." *Gersman*, 931 F.2d at 1565 (quoting *Patterson, supra*, 491 U.S. at 185). Plaintiff's relationship with Greater Southeast remained substantially the same as it always existed. His Staff membership and privileges continued, subject only to the two-year monitoring and supervision agreement. Following the expiration of the agree-

ment, plaintiff retained full Staff membership and privileges. At no point did either plaintiff or Greater Southeast consider the signing of the monitoring and supervision agreement to be the creation of a new" contractual relationship. The court therefore rejects plaintiff's argument that the signing of the monitoring and supervision agreement constitutes a making" of a new contract under § 1981.

The court also rejects plaintiff's argument that Greater Southeast's alleged refusal to act on plaintiff's application for reappointment is actionable under 1981. The court in *Gersman* ruled that renewals, like postformation modifications, were governed by the existing contract. Accordingly, the Court held that allegations of failure to renew a contract were not actionable under § 1981. *See id.* at 1573. The *Gersman* court is not alone in holding that claims for failure to renew a contract fall outside the scope of § 1981. *See, e.g., Artis v. Hitachi Zosen Clearing, Inc.*, 967 F.2d 1132 (7th Cir. 992); *Hull v. Cuyahoga Valley Joint Vocational School Dist. Bd. of Ed.*, 926 F.2d 505 (6th Cir. 1991, *cert. denied, Hull v. Schuck*, 501 U.S. 1261, 115 L. Ed. 2d 1080, 111 S. Ct. 2917 (1991); *Brereton v. Communications Satellite Corp.*, 735 F. Supp. 1085 (D.D.C. 1990), *appeal dismissed without op.*, 925 F.2d 488 (D.C. Cir. 1990). Because the substance of the facts alleged in the complaint plainly implicates postformation conduct which is not actionable under § 1981, the court would be compelled to grant defendants' motion for summary judgment on plaintiff's § 1981 claims.

Plaintiff also claimed that defendants Conduct violated the Civil Rights Act of 1871, 42 U.S.C. § 1985. Section 1985 provides in pertinent part:

> If two or more persons. . . conspire. . . for purpose of depriving, either directly or indirectly, any person or class of persons of equal protection of the laws, or of equal privileges and immunities under the laws. . . the party so injured or deprived may

> have an action for recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

Id. at § 1985(3).[11] In *Great Amer. Fed. Sav. & Loan Assoc. v. Novotny*, 442 U.S. 366, 60 L. Ed. 2d 957, 99 S. Ct. 2345 (1979), the Supreme Court observed that § 1985(3) was a purely remedial in nature, embodying no substantive rights of its own. *See id.* at 372. Consequently, the claimant must demonstrate that the defendant's conduct violated the rights, privileges, and immunities under the Fourteenth Amendment that § 1985(3) was intended to vindicate. In this case, plaintiff asserted that his rights under § 1981 were violated, and that such a violation gives rise to a § 1985 remedy. Plaintiff is correct that a violation of federal rights secured by § 1981 may serve as the basis of a § 1985 claim.. *See, e.g., Alder v. Columbia Historical Society*, 690 F. Supp. 9 (D.D.C. 1988); *Thompson v. Int'l Assoc. of Machinists*, 580 F. Supp. 662 (D.D.C. 1984). However, as discussed above, plaintiff failed to state a claim under § 1981. Furthermore, violations of Title VII, discussed *infra*, may not be redressed through § 1985. *See Novotny, supra,* at 378. Plaintiff therefore has not set forth any allegations that would entitle him to the remedy provided by § 1985. Accordingly, the court would be compelled to grant defendants' motion for summary judgment on plaintiff's § 1985 claim.

2. Title VII Claim

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[11] 42 U.S.C. § 1985, also known as the "Ku Klux Klan Act," was designed to deter the Klan from committing vile transgressive acts against the rights of African-American citizens. *See Griffin v. Breckenridge*, 403 U.S. 88, 29 L. Ed. 2d 338, 91 S. Ct. 1790 (1971). Subsections (1) and (2) prohibit acts that may prevent a federal law enforcement official from performing his duty or otherwise obstruct justice. Neither of these subsections is applicable to this case.

Plaintiff also alleged that defendants unlawfully discriminated against him in the terms, conditions, and privileges of his employment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, by their refusal to grant him unrestricted Medical Staff membership and hospital privileges and their failure to act on his application for reappointment to the Medical Staff.[12] Defendants moved for summary judgment with respect to these claims on the grounds that Title VII applies only to employment relationships, and no employment relationship has been implicated in this case. Defendants first presented the undisputed fact that at no point was Dr. Johnson ever employed by Greater Southeast.[13] Defendants went on to argue that the relationship between physician and patient is not one of employment, but more closely aligned to that of an independent contractor. Because no employment relationships were implicated in this case, the defendants urged the court to grant its motion for summary judgment on plaintiff's Title VII claim.

Plaintiff conceded that he had never been employed by Greater Southeast, and therefore was not entitled to employee protection in the traditional sense under Title VII. However, plaintiff argued that Title VII also applies to conduct that interferes with employment relationships like the physician-patient relationship, and that Greater Southeast's conduct interfered with his ability to service his patients. Under this

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[12] 42 U.S.C. § 2000e-2(a)(1) provides in pertinent part as follows:

(a) It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment. . .. *Id.* An "employer" is defined in 42 U.S.C. § 2000e(b) as a "person engaged in an industry affecting commerce who has fifteen or more employees. . . ." *Id.* An employee is simply "an individual employed by an employer. . . ." *Id.* At 2000e(f).

[13] Plaintiff acknowledged in his deposition that he has never been an employee of the Greater Southeast. *See* Dep. of Plaintiff, p. 481.

latter theory, plaintiff claims he is entitled to Title VII coverage.

Plaintiff relies principally on the D.C. Circuit's opinion in *Sibley Memorial Hosp. v. Wilson,* 160 U.S. App. D.C. 14, 488 F.2d 1338 (D.C. Cir. 1973). In *Sibley*, plaintiff-appellee Wilson, a male private duty nurse, sued Sibley Memorial Hospital for allegedly discriminating against him in violation of Title VII. The plaintiff was not an employee of the hospital, but rather was listed with an independent nurses' registry. Patients at the defendant-hospital who required the services of a private duty nurse would submit a request to a hospital staff person, who would then notify the nurse's registry. The registry matched the request with the name of an available nurse. The nurse would be informed of the assignment and report directly to the patient's room. On two occasions, when the requesting patient was female and Wilson was "matched" by the registry, the hospital's supervisory nurses refused to let him report to the patient. The court, in holding that the relationship between Wilson and Sibley Memorial Hospital was sufficient to bring the case within the ambit of Title VII, stated:

> We think it significant that the Act has addressed itself directly to the problems of interference with the direct employment by labor unions and employment agencies-institutions which have not a remote but a highly visible nexus with the creation and continuance of direct employment relationships between third parties.

448 F.2d at 1342. Dr. Johnson argued that the relationship between physician and patient could be similarly characterized as one of employment, and that Medical Staff membership and privileges at Greater Southeast provide clear employment opportunities for practicing physicians. Dr. Johnson therefore concluded that he was entitled to protection under Title VII because control over the access to such employment opportuni-

ties lies squarely in the hands of the Hospital.

Dr. Johnson's attempt to align his claim with the claim upheld in *Sibley* is not persuasive because, unlike the nurse in Sibley, Dr. Johnson's relationship with his patients is not one of employment. In *Spirides v. Reinhardt*, 198 U.S. App. D.C. 93, 613 F.2d 826 (D.C. Cir. 1979), the court addressed the question of how employee status is determined under Title VII. Writing for the panel. Judge McGowan reasoned that the determination should turn on an "analysis of the economic realities' of the work relationship." 613 F.2d at 831. Judge McGowan elaborated on this analysis:

> This test calls for application of general principles of agency to undisputed or established facts. Consideration of all the circumstances surrounding the work relationship is essential, and no one factor is determinative. Nevertheless, the extent of the employer's right to control the "means and manner" of the worker's performance is the most important factor to review here. . .. If an employer has the right to control and direct the work of an individual, not only as to the result achieved, but also as to the details by which that result is achieved, an employer/employee relationship is likely to exist.

Id. at 831-32 (footnotes omitted). It is beyond dispute that a patient does not control the "manner and means" of a physician's medical services. The practice of medicine is a highly specialized and skilled occupation. A patient simply cannot exercise the sort of detailed control over the "manner" of a physician's work that is normally found in an employer-employee relationship. The same is true for the "means" by which a physician practices medicine. Patients do not provide the equipment that is used by physicians in treating them. Patients do not provide physicians with the office apace and examining rooms in which

to practice.

The absence of such control suggest that the relationship between physician and patient is more aptly characterized as an independent contractor relationship. The lack of control over a contracted worker is the distinguishing feature of an independent contractor. According to the Restatement (Second) of Agency (1958), a servant [more recently termed "employee"] is an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right of control by the master." *Id.* at § 2 (emphasis added). In contrast, an independent contractor is "a person who contracts to work with another to do something for him but who is not controlled by the other nor subject to the other right of control with respect to his physical conduct in the performance of the undertaking." *Id.* (emphasis added).

An analysis of the physician-patient relationship in light of the other evaluative criteria set forth in *Spirides* also point decidedly toward an independent contractor relationship. The court indicated that reviewing courts should consider: (1) the kind of occupation, and whether the work is supervised or conducted by a specialist without supervision; (2) the skill required to perform the work; (3) whether the "employer" or individual in question furnishes the equipment used and the place of work; (4) the length of time the person has worked; (5) the method of payment (i.e., by time or by the job); (6) the method by which the work relationship is terminated (i.e. by one or both parties, with or without notification and explanation); (7) whether worker is eligible for annual leave; (8) whether work is an integral part of the "employers" business; (9) whether the work accumulates retirement benefits; (10) whether the "employer" pays social security taxes; and (11) the intention of the parties, *See Spirides, supra*, at 832.

An evaluation of the physician-patient relationship under these criteria indicates a classic independent contractor relationship: (1) a physician's work is normally conducted without

supervision by the a patient; (2) the practice of medicine is a highly skilled and specialized profession; (3) neither the equipment nor the place of work is provided by the patient; (4) a physician's work with respect to individual patients is usually brief and/or episodic; (5) the method of payment varies with patient and the particular services rendered; (6) the work relationship can be terminated at will by either the patient or the physician; (7) no annual leave is provided by the patient; (8) the services provided by the physician are typically not an integral part of the work of the patient; (9) the patient provides no retirement benefits for the physician; (10) the patient pays no social security taxes; and (11) patients generally do not intend to become a physician's employer. Since plaintiff's status is that of an independent contractor and not an employee, he may not invoke Title VII as a basis for his claim against the Hospital.[14]

Moreover, even if the law of agency was such that a physician could be construed as an employee of his patients, it is unclear under the facts of this case whether Greater Southeast's exercise of authority over the allocation of staff membership and hospital privileges at Greater Southeast sufficiently interfered with Dr. Johnson's ability to take on "employers"/patients so as merit coverage of Dr. Johnson's claims under Title VII. In *Sibley*, the hospital prevented plaintiff from entering into employment relationships with patients by blocking plaintiff's physical access to his potential employers. The hospital therefore had complete control over plaintiff's ability to secure

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[14] Courts in other jurisdictions that have confronted this issue have reached the same conclusion. *See, e.g., Mitchell v. Frank R. Howard Memorial Hospital*, 853 F.2d 762 (9th Cir. 1988), *cert. denied*, 489 U.S. 1013, 103 L. Ed. 2d 186, 109 S. Ct. 1123 (1989) (holding that "as a matter of law [plaintiff's] allegations that the hospital interfered with his relationships with his patients fail to state a claim for relief under Title VII."); *Beverley v. Douglas*, 591 F. Supp. 1321, 1328 (S.D.N.Y. 1984) ("[A physician's] relationship to her patients is not that of employer and employee – and defendants accordingly are entitled to summary judgment on the Title VII claim.")

potential employment. This is not true for Dr. Johnson. Unlike the nurse in *Sibley*, Dr. Johnson's access to potential patient-employers is not controlled by the Hospital. Greater Southeast may control the premises on which Dr. Johnson may wish to practice medicine, but the hospital has absolutely no control over Dr. Johnson's ability to secure patients and to enter into employment relationships with the patients. Although Medical Staff membership and hospital privileges at Greater Southeast certainly facilitate the doctor-patient relationship – particular if patients prefer to be treated at Greater Southeast rather than some other hospital – Greater Southeast, in its discretionary granting of membership and privileges, in no way robs Dr. Johnson of his ability to secure patient, or present them for treatment at other medical facilities.

It is also worth noting that a Title VII claim is not always cognizable where the defendant "control[s] access to such employment." *Id.* at 1342 (emphasis added). Although "control" is an important aspect to be considered, it is neither the sole nor determinative factor as to whether a particular claim falls under the purview of Title VII. For example, a licensing board has the power to deny an applicant the ability to earn a living at his chosen profession. A licensing board, by its very existence, has complete control over access the regulated professional job market. Despite this control, such boards have been routinely held not to be employers, *See, e.g.*, *Haddock v. Bd. of Dental Examiners*, 777 F.2d 462 (9th Cir. 1985); *Woodard v. Virginia Bd. of Bar Examiners*, 598 F.2d 1345 (4th Cir. 1979) (per curiam); *Tyler v. Vickery*, 517 F.2d 1089 (5th Cir, 1975). *cert. denied*, 426 U.S. 940, 49 L. Ed. 2d 393, 96 S. Ct. 2660 (1976); *Nat'l Org. for Women v. Waterfront Comm'n of New York Harbor*, 468 F. Supp. 317 (S.D.N.Y. 1979).

Plaintiff's theory of Title VII coverage requires that he allege and prove some link between the defendants' actions and some employment relationship involving himself. Plaintiff has failed to make this connection. Plaintiff admitted that he was

never an employee of Greater Southeast. Furthermore, no employer-employee relationship is implicated in physician's medical practice at Greater Southeast. Thus, defendants would be entitled to summary judgment on plaintiff's Title VII claim.

3. D.C. Human Rights Act Claims

Plaintiff alleged violations of the District of Columbia Human Rights Act, D.C. Code § 1-2512 (1981), based on the same set of facts. Like the federal civil rights laws, the District's statute outlaws employment discrimination and conspiracies to deprive persons of their rights. However, in light of the court's dismissal of plaintiff's federal claims, this court has no jurisdiction over plaintiff's municipal law claims. The only basis for this court's jurisdiction over plaintiff's D.C. Human Rights Act claims is the court's discretionary exercise of pendant jurisdiction. A federal court may exercise pendant jurisdiction over municipal law claims when such claims are so inextricably intertwined with the facts and circumstances giving rise to the federal claims that they "form part of the same case or controversy under Article III." 28 U.S.C. § 1367. However, in light of the court's decision to grant defendants' motions for summary judgment on all of plaintiff's federal claims, the court has no basis to exercise pendant jurisdiction. *See United Mineworkers v. Gibbs*, 383 U.S. 715, 16 L. Ed. 2d 218, 86 S. Ct. 1130 (1966). There must be a valid federal claim against each defendant for whom plaintiff seeks to present a claim of pendant jurisdiction under the D.C., Human Rights Act. *See, e.g., Brereton, supra*; *Byrd v. Pyle*, 728 F. Supp. 1 (D.D.C. 1989); *Clifton Terrace Assoc. v. United Technologies*, 728 F. Supp. 24 (D.D.C. 1990), aff'd in part and vacated in part, 289 U.S. App. D.C. 121, 929 F.2d 714 (D.C. Cir. 1991). With no such federal claims remain in the litigation, this court is prevented from exercising pendant jurisdiction over plaintiff's local claims. Accordingly, the court shall dismiss plaintiff's claims under the D.C. Human Rights Act

for lack of jurisdiction.

C. Tortious Inducement of Breach of Contract

Plaintiff alleged that defendant Hinman "intentionally, willfully, and tortiously induced a breach of contract between Plaintiff and Defendant Hospital in that he caused Defendant Hospital arbitrarily to terminate Plaintiff's Medical Staff membership and privileges." Complaint p. 68. Plaintiff's claim is grounded in the common law of tort, and as such, is a pendant claim in this federal litigation. In light of this court's decision to dismiss all of plaintiff's federal claims, this court has no basis to exercise subject matter jurisdiction over plaintiff's common law tort claim. *See United Mineworkers, supra.* Accordingly, plaintiff's tort claim against defendant Hinman shall be dismissed for lack of jurisdiction.[15]

III. CONCLUSION

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[15] Even if the court had jurisdiction to hear the matter, plaintiff's claim still fails as a matter of law because defendant Hinman engaged in his allegedly tortious conduct on behalf of Greater Southeast and therefore lacks the "third party" status required for this cause of action. *See Press v. Howard University*, 540 A.2d 733, 736 (D.C. 1988). In affirming the trial court's dismissal of plaintiff's tortious interference claim, the D.C. Court of Appeals stated:

> The individual defendants, all of whom were officers of the University, were acting as agents of the other party to the contract, and. . . the University through their actions could not tortiously interfere with its own contract.

Id. at 763. The court's decision in Press is supported by ample authority. *See Newman v. Legal Serv. Corp.*, 628 F. Supp. 535, 541 (D.D.C., 1986); Donohoe v. Watt, 546 F. Supp. 753, 757 (D.D.C. 1982), *aff'd*, 230 U.S. App. D.C. 70, 713 F.2d 864 (1983); *Wilmington Trust Co. v. Clark,* 289 Md. 313, 327-330, 424 A.2d 744, 754-755 (1981); W. Keeton, Prosser and Keeton on the Law of Torts § 129, at 990 (5th Ed. 1984).

A separate Order summarizing all the above shall issue this date.

/s/
Royce C Lamberth
United States District Judge

DATE: 10-19-95

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Harold D. Johnson, M.D.,
Plaintiff,

v.

Civil Action No. 90-1992
(RCL)

Greater Southeast Community
Hospital Corporation, et al.,
Defendants.

October 19, 1995, Decided
October 19, 1995, FILED

Before: Royce C. Lamberth, United States District Judge

ORDER

For the reasons set forth in the accompanying Memorandum Opinion, it is hereby

ORDERED that:

1. Plaintiff's antitrust claims involving Greater Southeast community Hospital ("Greater Southeast"), Johns Hopkins Health Plan ("Johns Hopkins"), and United Health Services contained in Counts I, II, and III of the Complaint are DISMISSED *sua sponte* for lack of ripeness.

2. All of defendants' pending motions for summary judgment on antitrust claims involving Greater Southeast, Johns Hopkins, and United Health Services are DISMISSED as moot.

3. Defendants' motion for summary judgment on plaintiff's antitrust claims involving Columbia Hospital for Women Medical Center ("Columbia Hospital") contained in

Count I of the Complaint is GRANTED.

4. Plaintiff's antitrust claims involving Columbia Hospital are DISMISSED with prejudice.

5. Plaintiff's motion for issuance of a trifurcated briefing schedule and enlargement of time in which to respond to defendants' motions for summary judgment is DENIED.

6. Plaintiff's motion for leave to file an opposition to defendants' motion for summary judgment on civil rights claims out of time is DENIED.

7. Defendants' motion to strike plaintiff's opposition to defendants' motion for summary judgment on civil rights claims and all accompanying papers filed out of time is DENIED as moot.

8. Defendants' unopposed motion for summary judgment on all civil rights claims (Counts IV and V of the Complaint) is GRANTED as conceded pursuant to local rule 108(b).

9. Plaintiff's civil rights claims (Counts IV and V of the Complaint) are DISMISSED with prejudice.

10. Plaintiff's tort claim against defendant Hinman (Count VI of the Complaint) is DISMISSED for lack of subject matter jurisdiction.

Accordingly, this entire case now stands DISMISSED.

SO ORDERED.

/s/
Royce C. Lamberth
United States District Judge

DATE: 10-19-95

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Harold D. Johnson, M.D.,
Appellant,

v. No. 91-7002

Greater Southeast Community
Hospital Corporation, *et al.*,
Appellees.

Appeal from the United States District Court
for the District of Columbia

October 23, 1991, Argued
December 13, 1991, Decided

As Amended December 13, 1991

BEFORE: Mikva, Chief Judge, Wald and Buckley,
Circuit Judges

OPINION

Dr. Harold D. Johnson appeals the dismissal of his antitrust, civil rights and tort claims against Greater Southeast Community Hospital ("Greater Southeast" or "Hospital") of Washington, D.C. and certain individuals affiliated with the Hospital. Appellant alleges that appellees have engaged in a course of conduct designed to prevent him, for racially discriminatory and anticompetitive reasons, from providing obstetrical services to Medicaid recipients in Ward 8 of the District of Columbia.

Finding that appellant's Medical Staff membership and privileges at the Hospital had not been terminated, the district court dismissed appellant's suit as unripe. We reverse the dismissal and remand for further proceedings to determine (1) if appellant's Medical Staff membership and privileges are, in fact, now terminated; and (2) if appellant's claims of injury apart from the termination of his Medical Staff membership and privileges are ripe for review.

Appellant also appeals from the district court's denial of his motion for summary judgment on his civil rights claims. Because a denial of a motion for summary judgment is not an appealable order, we decline to rule on that issue.

Finally, the district court sealed the entire record in this case, with the exception of appellant's complaint. Appellant has moved this court to unseal the record. We decline to do so at this time, but urge the district court to give serious consideration, on remand, to any renewed motion to unseal in light of this circuit's demanding standards governing the sealing of judicial records.

I. BACKGROUND[1]

Dr. Harold D. Johnson, a board-certified physician specializing in obstetrics and gynecology, became a member of the Active Medical Staff of the Hospital in 1981. From 1981 until 1988 he applied for, and was granted, reappointment to the Active Medical Staff without limitation. In January, 1989, however, the Chairman of the Hospital's Department of Obstetrics and Gynecology reported to the Medical Staff Executive

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[1] On October 2, 1991, we ordered appellees to designate the specific portions of the record that they contend should remain under seal. They responded with an exhaustive list on October 8, 1991, the disposition of which would take longer to decide than the merits of the appeal. Accordingly, in our opinion we have tried in the main to avoid specific references to items on the list without in any suggesting that they are entitled to remain under seal. We leave for the district court the inquiry as to the merits of appellees' contentions for confidentiality of particular items.

Committee ("MSEC") that he had become aware of quality of care issues concerning Dr. Johnson. The MSEC established a six-member ad hoc committee to investigate; three of the members of that committee are named as defendants in Dr. Johnson's suit.

In July, 1989, while the MSEC's investigation was ongoing, Greater Southeast entered into an exclusive contract with the Johns Hopkins Health Plan, a health maintenance organization, to provide in-patient services to the Plan's Washington, D.C. subscribers. At the same time, United Health Services, a preferred provider organization composed of certain members of Greater Southeast's Medical Staff, entered into an exclusive contract with the Johns Hopkins Health Plan to provide physician services to the Plan's District subscribers. Appellant's 1989 applications for membership in the Johns Hopkins Plan and United Health Services were both denied. Three of the physician defendants in this suit are members of both the Johns Hopkins Plan and United Health Services.

The MSEC finished its investigation on August 14, 1989, concluding that appellant should be subjected to "a severe reprimand, focused review, concurrent monitoring and supervision of surgical cases for a minimum of 24 months." *Johnson v. Greater Southeast Community Hosp. Corp.*, No. 90-1992, *Memorandum Opinion* ("Mem. Op.") at 4 (D.D.C. Dec. 12, 1990). Three days later, the Medical Staff President, also a defendant in this case, informed appellant that the MSEC's recommendation would be reviewed by the Hospital's Board of Directors, but that in the meantime appellant would be placed on summary suspension and must turn over care of his patients to other physicians immediately. An informal hearing before the MSEC on the suspension was scheduled for August 21, 1989.

At the hearing, appellant was asked whether he would be willing to accept the MSEC's recommendation for close monitoring and supervision. Appellant indicated that he would, and on August 23 he signed an agreement outlining the terms of the

monitoring and supervision program, at which time the summary suspension was rescinded. After further review and approval of the MSEC's actions by both the Board of Directors and the Board's Quality Assurance Committee, the Board of Directors convened for a final decision on appellant's case on October 19 and 23, 1989.

At some time before those meetings, appellant submitted his application for reappointment to the Active Medical Staff for the 1990-1991 cycle.[2] The Hospital has to date taken no action on his reappointment.

At its October meetings, the Board considered two possible actions regarding Dr. Johnson: retaining him on the Medical Staff subject to the 24-month monitoring and supervision program or terminating his Medical Staff membership and privileges altogether.[3] The Board decided upon the latter course, permitting Dr. Johnson, however, to continue practicing at the Hospital under the monitoring and supervision agreement while he pursued any hearing or appeal rights under the Hospital's bylaws. On October 24, 1989, the President of the Hospital informed appellant by letter of the Board's decision to terminate him and that he had forty-five days in which to request a formal hearing, after which the Board's decision would become final and his Medical Staff membership and privileges would automatically terminate. He also conveyed the Board's determination that pending your decision concerning a formal hearing, and during any hearing proceedings, your Medical Staff membership and privileges may continue under the monitoring agreement you signed on August 23, 1989.
Id . at 6.

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[2] The record indicates only that the application was submitted in September, 1989.

[3] Appellee Edward J. Hinman, M.D., M.P.H., was a principal advocate for termination of appellant's membership and privileges at Greater Southeast; appellant has alleged that Dr. Hinman caused the Hospital to terminate its contract with him.

Appellant duly requested a hearing, a Hearing Officer was appointed, and hearings were conducted on February 15 and 16, 1990. On March 21, 1990, one day before hearings were scheduled to resume, appellant filed a breach of contract action in the Superior Court of the District of Columbia alleging that the Hearing Officer's decision to permit the Hospital to call an independent expert witness violated the Hospital's bylaws. The court denied appellant's claim for immediate injunctive relief and the hearings continued, as scheduled, on March 22, 1990.

The final day of hearings was scheduled for April 5. 1990. On April 4, the Hearing Officer notified the parties that he would not proceed until appellant's Superior Court suit was resolved. Thereafter, on April 18, appellant served each member of the Board of Directors with a "post-hearing" brief requesting that the Board reconsider its decision to terminate his Medical Staff membership and privileges. The Board voted to wait until completion of the hearings and receipt of a report from the Hearing Officer before making any final decision regarding Dr. Johnson's status at the Hospital.

On May 8, 1990, appellant's Superior Court suit was dismissed as unripe. The Hearing Officer nonetheless refused to proceed unless the parties stipulated that the proceedings were covered by the immunity provisions of the Health Care Quality Improvement Act of 1986, 42 U.S.C. §11111 (1988). The Hospital agreed to so stipulate, but appellant would not; the Hearing Officer resigned effective August 2, 1990.

While the hearings were in recess, but before the Hearing Officer's formal resignation, appellant applied for reappointment to the Courtesy Staff of Columbia Hospital for Women Medical Center in Washington, D.C. In order to evaluate appellant's application, Columbia Hospital requested that Greater Southeast forward to it copies of the patient histories that had been the subject of Greater Southeast's investigation of Dr. Johnson. The record is not clear as to what happened following this request. Appellant alleges, however, that the Hospital did not promptly

comply with this request, causing Columbia Hospital to temporarily suspend his privileges at that facility. The district court made no findings on this aspect of the case, but it does appear that Dr. Johnson eventually received reappointment to the Columbia Hospital Staff.

On August 10, 1990, counsel for the Hospital wrote to appellant's counsel inquiring how appellant wished to proceed in light of the Hearing Officer's resignation. Appellees' counsel proposed that the matter be submitted to the Board on the hearing record developed as of that date. Appellant did not respond to this offer; instead, he filed this suit on August 17, 1990.

Appellant alleges that the Hospital and named defendants[4] have conspired to boycott him from maintaining Medical Staff membership and privileges at Greater Southeast and to restrain trade and commerce in in-patient obstetrical services - all in violation of §§1 and 2 of the Sherman Antitrust Act, 15 U.S.C., §§1,2 (1988), and the comparable provisions of the District of Columbia Code.[5] In furtherance of this conspiracy, appellant alleges, inter alia,[6] that appellees have caused the termination of his Medical Staff membership and privileges at Greater Southeast, precluded him from obtaining membership in the Johns Hopkins Medical Plan and United Health Services and interfered with his application for reappointment to the Medical Staff at

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[4] The Hearing officer was originally named as a defendant in this suit. By order of December 11, 1990, the district court granted his motion to dismiss, finding that he was immune from suit pursuant to the Health Care Quality Improvement Act of 1986. *Johnson v. Greater Southeast Community Hospital Corp.*, No. 90-1992, *Memorandum Opinion* (D.D.C. Dec. 11, 1990). The district court's order was summarily affirmed by a panel of this court on April 5, 1991. *Johnson v. Greater Southeast Community Hosp. Corp.*, No. 91-7002 (D.C. Cir. Apr. 5, 1991) (Order).

[5] *See* D.C. Code Ann. §§ 28-4502, 28-4503 (1981).

[6] *See infra* note 9.

Columbia Hospital for Women Medical Center.

Appellant, who is black, also alleges that appellees have failed to contract with him on racially-neutral grounds, in violation of 42 U.S.C. §§ 1981 and 1985, and unlawfully discriminated against him in the terms, conditions and privileges of his employment, in violation of Title VII of the Civil Rights Act of 1964 and § 1-2512 of the District of Columbia Code, by their refusal to grant him unrestricted Medical Staff membership and privileges and their failure to act on his application for reappointment to the Medical Staff.

Finally, appellant alleges that appellee Hinman tortiously induced a breach of contract between appellant and the Hospital through his advocacy of the termination of appellant's Medical Staff membership and privileges at Greater Southeast.

Appellees first moved that the district court seal the entire record in this action. By orders of September 24 and December 12, 1990, the court granted appellees' motion, sealing the entire record except for appellant's complaint. Subsequently, appellees moved for dismissal and/or summary judgment of all claims, arguing principally that Dr. Johnson's claims were not ripe for adjudication because termination proceedings had not been completed. Appellant in turn moved for summary judgment on his civil rights claims, arguing that appellees had failed to meet their burden of articulating a legitimate, nondiscriminatory reason for their actions against him. The district court granted appellees' motion to dismiss all claims, finding that "because the plaintiff's privileges and membership at the hospital remain intact, subject to the monitoring program agreed to by the plaintiff, the plaintiff has suffered no injury which is ripe for judicial consideration at this time under either antitrust law, civil rights law, or in tort." *Mem. Op.* at 10. The court rejected appellant's argument that the terms of the monitoring and supervision agreement themselves constituted "injury" that was ripe for adjudication, finding that appellant entered into the monitoring agreement "voluntarily," that he had not demon-

strated that the terms of the agreement harmed his practice, and that the agreement was not a "permanent or final action by the hospital," but might be rescinded upon completion of the termination proceedings. *Id.* at 9.

Dr. Johnson here appeals the dismissal of his suit and the denial of his motion for partial summary judgment on the civil rights claims. He also moves that this court unseal the entire record.

II. ANALYSIS

A. Ripeness

1. Claims of Injury Related to Appellant's Medical Staff Membership and Privileges at Greater Southeast

The district court dismissed appellant's antitrust, civil rights and tort claims on the grounds that his Medical Staff membership and privileges at the Hospital remain intact, subject to the monitoring and supervision agreement, and that therefore he has as yet suffered no "injury" that would make his claims ripe for adjudication. Even if the district court were literally correct that Dr. Johnson's privileges had not been terminated at the time of its ruling a year ago, assertions as to later developments made by counsel at argument of the appeal strongly suggest that that may no longer be the case.

Counsel for appellant stated that the monitoring and supervision agreement under which Dr. Johnson was practicing during the pendency of his appeals was effective for only two years and expired by its own terms on August 23, 1991. She stated that Dr. Johnson no longer enjoys any privileges at Greater Southeast Hospital. If that is so, then any ripeness obstacles to Dr. Johnson's claims based upon termination no longer exist. Although it is true that we normally review a district court's

decision solely on the basis of the facts before it, *see, e.g., Goland v. CIA*, 607 F.2d 339, 370 (D.C. Cir. 1978), *cert. denied*, 445 U.S. 927, 63 L. Ed. 2d 759, 100 S. Ct. 1312 (1980), it would make little sense in this case to affirm or reject a dismissal for lack of ripeness based on circumstances which may no longer exist. This is especially true when we are remanding other parts of the case based on the same factual scenario which are not dependent on the termination proceeding. *Cf. Powell v. United States Bureau of Prisons*, 288 App. D.C. 384, 927 F.2d 1239, 1243 (D.C. Cir. 1991) (remanding for consideration of new evidence in light of "unusual circumstances" and the equities of the case). Accordingly, we are remanding to the district court for additional fact-finding on the key jurisdictional fact of whether appellant's Medical Staff membership and privileges at the Hospital have been terminated.[7] If they have, appellant's claims of injury stemming from his termination no longer suffer any ripeness defect and the court should go on to consider them on the merits.[8]

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[7] At oral argument, appellant renewed his assertion that his Medical Staff membership and privileges expired by operation of law when the Hospital failed to grant or deny his application for reappointment to the Medical Staff within the 120-day period prescribed by D.C. Code Ann. § 32-1307(f) (1981). Appellant made this argument to the district court in opposing appellees' Motion for Dismissal and/or Summary Judgment, but the district court did not address it in its memorandum opinion. On remand, the district court should consider what effect, if any, this statutory provision has on appellant's Medical Staff membership and privileges at the Hospital.

[8] In remanding for further fact-finding on the termination question, we are not suggesting that a party alleging violations of the antitrust laws necessarily must await elimination from the market before bringing a private cause of action under the Clayton Act. *See Brief for Appellant* at 27-28; *Reply Brief for Appellant* at 8. We are merely saying that in order to make out a private cause of action for damages under § 4 of the Clayton Act, a party must allege injury to business or property resulting from a violation of the antitrust laws. *See* 15 U.S.C. § 15 (1988). A party "threatened" with injury that has yet to materialize does, however, have an injunctive remedy under the Clayton Act. *See* 15 U.S.C. § 26 (1988) (injunctive relief available when a party is "threatened [with] loss or damage by a violation of the

2. *Claims of Injury Independent of Termination*

Appellant alleged separate violations of law and resulting injuries apart from termination. On remand, the district court should determine whether in fact these claims are ripe for review, and, if so, proceed to adjudicate them on the merits. We enunciate several of these non-termination claims in the succeeding discussion.

a. Appellant's Antitrust Claims

A number of appellant's antitrust claims may be ripe for judicial review. In order to make out a claim for damages under § 4 of the Clayton Act, a party must "be injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15 (1988); *see, e.g., Krempp v. Dobbs*, 775 F.2d 1319, 1321 (5th Cir. 1985) ("to maintain an action for treble damages under 15 U.S.C. § 15, plaintiffs must allege and prove injury to their business or property proximately caused by a violation of the Sherman Act"); *Park v. El Paso Bd. of Realtors*, 764 F.2d 1053, 1068 (5th Cir. 1985), *cert. denied*, 474 U.S. 1102, 88 L. Ed. 2d 919, 106 S. Ct. 884 (1986) (proof of violation of Sherman Act standing alone does not establish civil liability for damages under § 4 of Clayton Act; there must be proof of injury to business or property); *Association for Intercollegiate Athletics for Women v. National Collegiate Athletic Ass'n*, 236 App. D.C. 311, 735 F.2d 577, 586 (D.C. Cir. 1984) (assuming that particular practice violates § 2 of Sherman Act, plaintiff still

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antitrust laws"); *see also Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130, 23 L. Ed. 2d 129, 89 S. Ct. 1562, 161 U.S.P.Q. (BNA) 577 (1969). Appellant, however, did not plead the "threat" of injury; he claimed that he had been terminated and was therefore entitled to treble damages under the antitrust laws.

has to prove that practice caused economic injury).

Appellant alleges that appellees have conspired to preclude his membership in the Johns Hopkins Health Plan and United Health Services. If proven, such a conspiracy is arguably "forbidden" by the antitrust laws. Moreover, it may have caused, and/or continues to cause, injury to appellant's practice.

Appellant also alleges that appellees interfered with his application for reappointment to the Courtesy Staff at the Columbia Hospital for Women Medical Center. Again, if indeed appellees combined and conspired to interfere with or delay appellant's reappointment to the Courtesy Staff at Columbia Hospital for anticompetitive reasons, this too would arguably run afoul of the antitrust laws. Any resulting suspension of appellant's membership and privileges at that facility could have caused economic injury to appellant's practice. Thus, these two claims, as well as several of appellant's other antitrust claims,[9] would appear to allege sufficient injury to qualify for damages under § 4 of the Clayton Act[10] without regard to whether or not

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[9] Appellant also alleges antitrust injury stemming from: the Hospital's refusal to process his application for reappointment, his removal from the Hospital's Call Schedule, and appellees' defamatory remarks to others about his skills. We of course reach no conclusion as to the merits of these or any of appellant's claims.

[10] We find no error, however, in the district court's finding that appellant has failed to allege or demonstrate any economic harm to his practice stemming from the terms of the monitoring and supervision agreement. A demographics study submitted to the district court shows a drop in appellant's admissions to Greater Southeast, but does not support any inference that the reduction was the result of the monitoring and supervision agreement. In fact, Dr. Johnson testified before the Hearing Officer that the Hospital had assigned three physicians to monitor him "because of the number of patients that I was admitting to . . . [the] . . . hospital," *Transcript of Medical Adjudication Hearing* (Mar. 22, 1990) at 27, suggesting that appellant's practice was not suffering. Also, the President of the Hospital stated, by affidavit, that appellant had never advised him of a single instance in which he had sought to admit a patient to the Hospital and admission had been denied. *Declaration of Thomas W. Chapman*, attached as Exhibit 1 to Motion of Defendants to Dismiss or, in the Alternative, for Summary Judgment (filed Sept. 28, 1990) at 17.

appellant was terminated from Greater Southeast.

Appellees argue, however, that even if appellant has suffered some form of "legally cognizable injury" from these alleged practices, prudential considerations warrant deferring their judicial consideration until the Hospital hearing process has been completed. Brief for Appellees at 23. Prudential considerations do on occasion justify courts in postponing review of an administrative agency's actions despite the presence of an Article III "case or controversy." Prudential aspects of the ripeness inquiry focus on whether there is an inherent lack of fitness for judicial review at this juncture and include "'the agency's interest in crystallizing its policy before that policy is subject to judicial review, the court's interest in avoiding unnecessary adjudication and in deciding issues in a concrete setting, and the petitioner's interests in prompt consideration of allegedly unlawful agency action.'" *Natural Resources Defense Council, Inc. v. Thomas*, 269 App. D.C. 343, 845 F.2d 1088, 1093 (D.C. Cir. 1988) (quoting *Better Government Ass'n v. Department of State*, 250 App. D.C. 424, 780 F.2d 86, 92 (D.C. Cir. 1986)).

Even assuming that the same ripeness considerations apply outside of the agency context, they do not point towards a prudential deferral in this case. These allegedly illegal acts have already been completed. Appellees either conspired to exclude appellant from the Johns Hopkins Plan and United Health Services and to interfere with his reappointment to the Courtesy Staff at Columbia Hospital or they did not. He either suffered injury from such acts or he did not. No amount of time will further "crystallize" appellees' "policy" in either regard, nor will deferral permit the development of a more concrete factual setting. There is no risk of unnecessary adjudication because the alleged injuries will survive, in the form of appellant's claims for damages, regardless of whether appellant is or is not ultimately restored to full membership and privileges at Greater Southeast.

We find, then, no prudential reason to defer consideration of appellant's antitrust claims that do not depend on termination.

b. Appellant's Civil Rights Claims

Appellant alleges that appellees have discriminated against him on racial grounds by subjecting him to the monitoring and supervision agreement and by refusing to act on his application for reappointment to the Medical Staff. We find that these claims are also ripe for adjudication and, on remand, should be considered on the merits.

If, as alleged, appellees have discriminated against appellant on the basis of race in their imposition of the monitoring and supervision agreement, this action would arguably give rise to private causes of action under Title VII of the Civil Rights Act of 1964 and/or 42 U.S.C. §§ 1981 and 1985, as well as the relevant provisions of the District of Columbia Code.[11] The district court held, however, that the terms of the agreement could not be a source of injury to appellant because he entered into it "voluntarily," Mem. Op. at 9. We think the district court erred in making that finding on voluntariness. The question of whether under all the attendant circumstances appellant "voluntarily" entered into the monitoring and supervision agreement is clearly a matter of dispute between the parties, and thus determinable only after an adversary hearing.

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[11] Even though the monitoring and supervision agreement did not cause antitrust injury to appellant's practice, *see supra* note 10, it did impose severe constraints on his practice. And of course, there is no comparable requirement under the civil rights laws that one need allege or demonstrate pecuniary injury in order to seek redress of allegedly illegal racial discrimination. *See, e.g., Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 434, 35 L. Ed. 2d 403, 93 S. Ct. 1090 (1973) (§ 1981 suit for damages and injunctive relief alleging racial discrimination in the membership policy of a community pool); *Clayton v. White Hall School Dist.*, 875 F.2d 676, 679 (8th Cir. 1989) ("Title VII . . . is to be accorded a liberal construction in order to carry out the purpose of Congress to eliminate the inconvenience, unfairness and humiliation of racial discrimination") (internal quotation omitted)); *Gray v. Greyhound Lines, East*, 178 App. D.C. 91, 545 F.2d 169, 176 (D.C. Cir. 1976) (claim of discriminatory treatment in the workplace is "clearly within the scope of Title VII's protection against discrimination in the terms, conditions, or privileges of employment").

Although appellant actually signed the monitoring agreement, the language of the accompanying letter from the Hospital clearly shows that he signed it to avoid termination of his hospital privileges. The letter states:

> pursuant to the recommendation of the Executive Committee at the meeting with you on August 21, 1989, the summary suspension of your privileges will be rescinded. The rescission becomes effective when you return the signed (monitoring agreement].

Letter from Medical Staff President to Appellant (Aug. 23, 1989) (emphasis supplied). Had appellant not signed the letter, the rescission would not have become effective and his hospital privileges would have been terminated immediately. Certainly if appellant is able to prove that the original termination was illegally motivated, it could not be said that he "voluntarily" entered into an agreement designed to rescind that unlawful termination.[12] The voluntariness issue was clearly in dispute and should not have been resolved on a motion to dismiss.

Appellant also alleges civil rights violations and injury in the failure of the Hospital to act on his application for reappointment to the Medical Staff. If racial animus animated that refusal, he has arguably suffered an additional injury cognizable under the civil rights laws.[13] In sum, then, appellant's allegations of civil rights violations appear to present no threshold jurisdictional obstacles to adjudication.

Appellees, however, again raise prudential objections to

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[12] *Cf. Johnson v. City of Columbia, S.C.*, Nos. 89-1554, 90-1401, 1991 WL 231298 (4th Cir. Nov. 12, 1991) (en banc) (fire fighter did not "voluntarily" agree to terms of employment agreement where City improperly threatened him with termination if he did not sign agreement).

[13] *See supra* note 11.

their consideration. And, at least insofar as the monitoring and supervision agreement is concerned, the district court agreed, finding that even if it did in fact injure appellant, his claim was not ripe because the agreement was not a "permanent or final action" since the Hospital might rescind it upon completion of the termination process. *Mem. Op.* at 9. The district court assumed, in effect, an exhaustion requirement whereby a party suffering allegedly discriminatory treatment must await the outcome of an internal institutional appeal before pursuing a civil rights claim in federal court.

This premise is not in accord with relevant precedents. A private party alleging federal civil rights violations need not pursue internal administrative remedies before pressing a claim in federal court. *See Doe on Behalf of Doe v. St. Joseph's Hosp.*, 788 F.2d 411, 425 (7th Cir. 1986); *Donaldson v. Taylor Products Div. of Tecumseh Products Co.*, 620 F.2d 155, 158 (7th Cir. 1980) (there is no exhaustion requirement under either of the civil rights acts); *Smallwood v. National Can Co.*, 583 F.2d 419, 421 (9th Cir. 1978) ("there is no duty to exhaust union remedies as a precondition to suit under Title VII"); *Rios v. Reynolds Metals Co.*, 467 F.2d 54, 57 (5th Cir. 1972) ("aggrieved employees may seek relief under Title VII without first invoking or exhausting available alternative legal or contractual remedies"). In *Doe on Behalf of Doe v. St. Joseph's Hospital, supra*, a woman doctor of Korean descent sued a hospital alleging, *inter alia*, that the hospital suspended her medical staff privileges on account of racial and gender animus in violation of 42 U.S.C. § 1981 and Titles VI and VII of the Civil Rights Act of 1964. Before filing her federal suit, however, she had not appealed the Executive Committee's affirmance of her suspension in accordance with hospital bylaws. The hospital argued therefore that the district court properly dismissed her civil rights claims because she had failed to exhaust her internal administrative remedies. The Seventh Circuit expressly rejected this argument, holding that exhaustion of remedies does not apply to claims

under § 1981, Title VII of the Civil Rights Act of 1964, or, for that matter, any of the federal civil rights laws. *See Doe*, 788 F.2d at 425-26.

Appellant has alleged violations of the federal civil rights laws and resulting injuries stemming from the terms of the monitoring agreement and the Hospital's refusal to promptly reappoint him to the Medical Staff. His claims appear to be ripe for adjudication and the district court should consider them on the merits.

B. Denial of Appellant's Motion for Summary Judgment on the Civil Rights Claims

Appellant also appeals the district court's denial of his motion for partial summary judgment on his civil rights claims. Because we find no reason to depart from the general principle that a denial of a motion for summary judgment is not a reviewable final decision. *McSurely v. McClellan*, 225 App. D.C. 67, 697 F.2d 309, 315 (D.C. Cir. 1982), we decline to review the district court's denial of appellant's summary judgment motion.

C. Appellant's Motion to Unseal the Record

On motion of appellees, the district court sealed the entire record in this case, with the exception of appellant's complaint. In a brief order filed December 12, 1990, the district court found that sealing the record was necessary in order to protect from public scrutiny the conduct of peer review activities within a health care facility. Such protection is necessary in order to promote and protect the peer review process in the health care industry, which in turn promotes improvement in health care . . .. Because every pleading in this case contains references to peer review actions and materials, the Court believes that the more limited action of issuing a protective order to cover the peer review materials would have the same effect as sealing the entire

case. *Johnson v. Greater Southeast Community Hosp. Corp.*, No. 90-1992, Order at 2 (D.D.C. Dec. 12, 1990). Appellant has asked us to unseal the record.

"The decision as to access [to judicial records] is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case." *United States v. Hubbard*, 208 App. D.C. 399, 650 F.2d 293, 316-17 (D.C. Cir. 1980) (quoting *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 599, 55 L. Ed. 2d 570, 98 S. Ct. 1306 (1978)). In *Hubbard*, we noted that a district court's decision to limit access to judicial records should, however, be informed "by this country's strong tradition of access to judicial proceedings." *Id.* at 317 n.89. Specifically, we articulated a series of factors that a district court should weigh in determining whether and to what extent a party's interest in privacy or confidentiality of its processes outweighs this strong presumption in favor of public access to judicial proceedings.[14]

We cannot discern from the district court's brief statement whether the court considered these factors in exercising its discretion to seal the record. Moreover, we do not think it sufficient merely to allude to the Hospital's general interest in keeping the peer review processes out of the public eye. That rationale sweeps far too broadly and would encompass all litigation involving public and private institutions that provide essential services to the public. On remand, the district court should reconsider the need for sealing the entire case in light of the Hubbard principles. Should the court determine that any sealing order remains appropriate, it should articulate the precise

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[14] These factors include: (1) the need for public access to the documents at issue; (2) the extent to which the public had access to the documents prior to the sealing order; (3) the fact that a party has objected to disclosure and the identity of that party; (4) the strength of the property and privacy interests involved; (5) the possibility of prejudice to those opposing disclosure; and (6) the purposes for which the documents were introduced. *See Hubbard*, 650 F.2d at 317-22.

reasons why, especially in view of appellant's desire for disclosure and an obvious public interest in being informed about the quality of health care.[15]

In sum, the district court should require appellees to come forward with specific reasons why the record, or any part thereof, should remain under seal. Should the court determine that some kind of sealing order is warranted, that order should be no broader than is necessary to protect those specific interests identified as in need of protection, In addition, any sealing order should not preclude appellant from turning over sealed materials to professional organizations that have a legitimate need to evaluate his credentials.[16]

III. CONCLUSION

We remand this case to the district court to determine whether appellant's Medical Staff membership and privileges at Greater Southeast have in fact been terminated. If so, all of appellant's claims would appear to be ripe and the district court should proceed to adjudicate them on the merits. If termination has not taken place, the court should nonetheless consider the merits of appellant's claims that do not depend on whether appellant's Medical Staff membership and privileges have been terminated. Of course, we reach no conclusion as to the merits of any of appellant's claims. Finally, the district court should

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[15] *Cf. Stone v. University of Maryland Medical Sys. Corp.*, No. 89-1023, 1991 WL 219426, at 2-3 (4th Cir. Oct. 31, 1991) (Ervin, C.J.) (reversing trial judge's sealing of peer review materials in suit by physician against hospital; rejecting notion that "once. . . medical records are properly subjected to pretrial discovery and may be admitted in evidence in the course of a civil action, that somehow, except as between the parties . . ., they remain insulated from public exposure for all other purposes").

[16] Counsel for appellant suggested at oral argument that the broad sealing order, by denying access to the medical records that appellant believes demonstrates the lack of merit of Greater Southeast's charges against him, as interfered with his ability to gain membership and privileges at other hospitals.

reconsider its decision to seal the entire record, and in so doing, assess the particular interests in confidentiality asserted by appellee and the extent to which a sealing order is necessary to protect them.

SO ORDERED.

/s/
Wald

DATED: December 13, 1991

APPENDIX H

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Harold D. Johnson, M.D.,
Plaintiff,

v. Civil Action No. 90-1992
(RCL)

Greater Southeast Community
Hospital Corporation, *et al.*,
Defendants.

MEMORANDUM AND ORDER

This matter comes before the court on defendant's motion and revised motion for reimbursement of reasonable attorneys' fees and costs expended in defense of this suite.[1] Upon consideration of filings by defense counsel, the court shall deny defendant's revised motion on the merits and dismiss defendants' original motion on mootness grounds for the reasons stated below.

DISCUSSION

In their motion and revised motion, defendants assert three alternative bases for recovery of attorney's fees and costs: (1) Section 11113 of the Health Care Quality Improvement Act of

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[1] Defendants initially presented a motion for attorneys' fees and costs on November 2, 1995, following the issuance of the court's Memorandum Opinion and Order of October 19, 1995. However, defendants submitted a revision of its first motion in view of the court's findings in its Memorandum Opinion and Order of June 24, 1996.

1986 ("HCQIA"), 42 U.S.C. §§ 11101-11152 (1988); (2) 28 U.S.C. § 1927; and (3) the Court's inherent powers. Although the bases for recovery asserted in each motion are identical, defendants have not moved to withdraw the original motion. Accordingly, the court shall address the arguments as presented in defendants' revised motion, and shall dismiss defendants' original motion as moot.

A. Recovery of Attorneys' Fees and Costs Under the HCQIA

Section 11113 of the HCQIA authorizes payment of reasonable attorneys' fees and costs expanded in defense of a suit if: (1) defendant has met the standards set forth under section 11112(a) of the HCQIA; (2) defendant has substantially prevailed in the litigation; and (3) the court finds that the claim or claimant's conduct during the course of the litigation was "frivolous, unreasonable, without foundation, or in bad faith." 42 U.S.C. § 11113. Defendants assert that all three requirements have been met in this case, and that they are entitled to recovery under the HCQIA.

The court agrees that defendants met the standards set forth under section 11112(a) of the HCQIA, and that defendants substantially prevailed in this litigation. The court, in its Memorandum Opinion and Order of June 24, 1996, carefully assessed the record in this case and expressly found that defendants satisfied the standards set forth in section 11112(a). Furthermore, the court's order unequivocally states that "this entire case now stands DISMISSED."

However, the court disagrees with defendants' assertion that plaintiff's claims were "frivolous, unreasonable, without foundation, and [presented] in bad faith." Defs.'s Mot., at 8. This court as well as the Circuit Court of Appeals has expended a considerable amount of time and energy on this case. If plaintiff's claims were wholly lacking in merit, either one of these courts could have dismissed, *sua sponte*, plaintiff's complaint as

frivolous. Obviously, no such determination was made by either court as to plaintiff's claims. To the contrary, the Circuit Court of Appeals remanded this case to the district court for the purpose of considering plaintiff's claims on the merits, *see Johnson v. Greater Southeast Community Hosp. Corp.*, 951 F.2d 1268, 1278 (D.C. Cir. 1991), and this court has done so pursuant to the Court's mandate. The nature of plaintiff's allegations, and the fact and circumstances surrounding this litigation simply do not support the conclusion that plaintiff's claims were frivolous, unreasonable, without foundation, or presented in bad faith. Accordingly, defendants' request for attorneys' fees and costs under section 11113 of the HCQIA shall be denied.

B. Award of Attorneys; Fees and Costs Under 28 U.S.C. § 1927

Defendants argue in the alternative that they are entitled to an award of attorneys' fees and costs under 28 U.S.C. § 1927. Section 1927 provides:

> An attorney or other person admitted to conduct cases in any court of the United States or Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney's fees reasonably incurred because of such conduct.

28 U.S.C. § 1927. Although plaintiff's counsel vigorously prosecuted this case, there is no evidence that she unreasonably or vexatiously multiplied proceedings. Moreover, there is no evidence that plaintiff prosecuted this case in "bad faith" or with "reckless indifference to the merits" of the claim. See *Hilton Hotels Corp. v. Banov*, 899 F.2d 40, 45 n.9 (D.C. Cir. 1992) (holding that "subjective bad faith" must be found for an award

under § 1927); *Reliance Ins. Co. v. Sweeney Corp.*, 792 F.2d 1137, 1138 (D.C. Cir. 1988) (holding that "reckless indifference to the merits of a claim" is sufficient to warrant liability under § 1927).[2] Accordingly, defendants' motion for attorneys' fees and cost under 28 U.S.C. § 1927 shall also be denied.

C. Award of Attorney's Fees and Costs Based on Inherent Powers of the Court

It is well settled that a court may award attorneys' fees and costs to sanction bad faith conduct, and that the power to do so emanates from the inherent powers of the court. *See Wallace*, 964 F.2d at 1219 (citing *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767 (1991). However, as discussed above, there is no evidence that plaintiff pursued this litigation in bad faith. Accordingly, the court finds that an award of attorneys' fees and costs made pursuant to the inherent powers of the court would be inappropriate in this case. *See Nepara Chemical, Inc. v. Sea-Land Service*, 794 F.2d 688, 702 (D.C. Cir. 1986) (holding that "attorneys' fees will be awarded only when extraordinary circumstances or dominating reasons of fairness so demand") .

D. Bill of Costs Under Local Rule 214

Defendants, as the prevailing party in this matter, may submit a bill of costs to the Clerk of Court pursuant to Local Rule 214, and such costs shall be taxed as provided in Rule 54 (d) of the Federal Rules of Civil Procedure. Defendants,

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[2] The D.C. Circuit Court of Appeals observed in *United States v. Wallace*, 964 F.2d 1214 (D.C. Cir. 1992) that "[t]he law of this circuit, reflecting a split in circuits generally, is unsettled over whether a court must find an attorney's actions to be in bad faith before imposing sanctions under § 1927." *Id.* at 1218 (citations omitted). This court, however, need not resolve this issue, as neither bad faith nor reckless indifference to the merits of plaintiff's claim was demonstrated in this litigation.

however, must file the bill of costs within 10 days of this order. Plaintiff may file any opposition thereto within 11 days of service of the bill of costs as provided for in Local Rule 214(b). Plaintiff may also seek review of the Clerk's taxation of costs by filing a notion to re-tax costs in this court.

CONCLUSION

Accordingly, for the reasons stated above, it is hereby

ORDERED that defendants' revised motion filed July 8, 1996, for reimbursement of reasonable attorneys' fees and costs is DENIED;[3] and it is further

ORDERED that defendants' original motion filed November 2, 1995, for reimbursement of reasonable attorney's fees and costs is DISMISSED as moot.[4]

SO ORDERED.

/s/

Royce C. Lamberth
United States District Judge

DATE: August 26, 1996

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[3] Although defendants did not specifically move for attorneys' fees and costs with respect to plaintiff's civil rights claims, the court notes that defendants would have been required to show that plaintiff's action was "frivolous, unreasonable, or without foundation," *see Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978) – a burden which defendants failed to meet with regard to the instant motion.

[4] Thus, if defendants had moved for attorney's fees and costs with respect to plaintiff's civil rights claims, the court would have denied that motion as well.

APPENDIX I

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Harold D. Johnson, M.D.,
Plaintiff,

v. Civil Action No. 90-1992
(RCL)

Greater Southeast Community
Hospital Corporation, *et al.*,
Defendants.

ORDER

This case comes before the court on plaintiff's motion for enlargement of time in which to respond to summary judgment motions, and defendants' opposition thereto. Plaintiff contends that discovery is ongoing and incomplete; that the court has granted continuances in other similar circumstances; that plaintiff's counsel is burdened by the press of other litigation; and that no prejudice will result.

The court in its order of January 31, 1995 has considered and rejected plaintiffs demand for additional discovery prior to responding to defendants' dispositive motions. Plaintiff's counsel, however, also seeks additional time due to the press of other cases. Accordingly, plaintiff's motion is GRANTED, and it is hereby

ORDERED that the time for plaintiff's response to defendant's four dispositive motins is enlarged to and including June 1, 1995. This date will not be further enlarged.

SO ORDERED.

/s/

Royce C. Lamberth
United States District Judge

DATE: April 12, 1995

APPENDIX J

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Harold D. Johnson, M.D.,
Plaintiff,

v. Civil Action No. 90-1992
(RCL)

Greater Southeast Community
Hospital Corporation, *et al.*,
Defendants.

MEMORANDUM OPINION AND ORDER

This case comes before the court on two discovery-related motions by the plaintiff. After giving consideration to the filings of counsel, and for the reasons more fully set forth below, it is hereby

ORDERED that:

1. Plaintiff's motion dated May 12, 1993 for a stay of briefing schedule and imposition of sanctions is DENIED.

2. Plaintiff's motion dated March 16, 1994 for a hearing on discovery matters and a new scheduling order is DENIED.

3. Plaintiff is advised that his oppositions to defendants outstanding motions for summary judgment must be filed within 30 days of the date of this order, or the motions will be treated as conceded.[1]

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[1] The four outstanding summary judgment motions, presently unopposed, include: (1) Defendant Hinman's motion as to breach of contract (count 6); (2) Defendants,' motion as to the antitrust claims (counts 1, 2 and 3); (3) Defendants' motion as to the civil rights claims (counts 4 and 5); and (4) Defendants' motion as to counts 1, 2, 3

4. To the extent that plaintiff believes inadequate discovery prevents him from offering facts essential to contesting the summary judgment motion(s), plaintiff must accompany his opposition to each motion with an affidavit as required under Fed. R. Civ. P. 56(f). The affidavit(s) should identify the specific information which has allegedly been withheld, the disputed issue that might be impacted by disclosure of the information, and the relevance of that issue to a particular argument raised by defendants in their motion(s) for summary judgment.

5. Plaintiff is also advised that each opposition to a motion for summary judgment must contain a statement of material facts as to which there is a genuine issue in dispute, as required by Local Rule 108 (h).

6. Other pending procedural motions[2] will be taken under advisement until the court has received full briefing on the outstanding summary judgment motions,

DISCUSSION

In his May 12, 1993 motion for stay of briefing and imposition of sanctions, plaintiff argues that he need not respond to the substantive issues raised in defendants' various motions for summary judgment. Plaintiff would prefer to await answers to pending interrogatories as well as resolution of plaintiff's motion

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and 6.

[2] There are three other procedural motions and one other dispositive motion now pending. Defendant Mohamadi moved for summary judgment on September 8, 1992; his motion has been fully briefed and will be addressed by the court shortly. The procedural motions are: (1) Plaintiff's motion dated February 1, 1993 to compel and extend discovery; (2) Defendants' motion dated March 25, 1993 for an order requiring plaintiff to show cause why he should not be precluded from filing a 26 (b)(4) statement for failure to comply with the court's scheduling order of December 9, 1992; and (3) Plaintiff's motion dated March 29, 1993 to file a 26 (b)(4) statement out of time.

to compel document production. Among the matters on which plaintiff seeks discovery are financial data, details of contracts, and definitions of defendant hospitals relevant market. Each of these items is pertinent, states the plaintiff, to underlying substantive issues. Without adequate discovery, plaintiff contends he is unable to respond properly to the summary judgment motions.

The court reserves judgment on the sufficiency of discovery.[3] But even if plaintiff is correct and defendants have withheld relevant information, the plaintiff may not *sua sponte* circumvent the procedures that have been instituted to resolve problems of this nature. First, Local Rule 108(b) requires that an opposing party file a memorandum of points and authorities in opposition to a motion within 11 days of the date the motion was served, unless otherwise permitted by the court. On April 16, 1993, the court ordered that opposition to defendants' March 26, 1993 motion be filed by May 10, 1993. Plaintiff has not obtained nor sought leave of this court to relax these deadlines. Second, Local Rule 108(h) dictates that opposition to a summary judgment motion be accompanied by a separate concise statement of material facts as to which it is contended there exists a genuine issue to be litigated. Plaintiff has not complied with Rule 108(h).

Third, Fed. R. Civ. P. 56(f) allows the court to refuse summary judgment or compel discovery if the opposing party has been denied opportunity to obtain the facts necessary to

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[3] Defendants dispute plaintiff's assertions regarding discovery. When plaintiff filed his motion for stay of briefing, discovery had been underway for approximately seven months. Defendants claim to have responded to 154 interrogatories and provided nearly 9,000 pages of documents, including factual information alleged by plaintiff to have been withheld. Plaintiff had taken 12 depositions.

support his opposition.[4] However, the opposing party must file an affidavit wherein he states the reasons he has been denied essential facts. The affidavit need not go to the merits of the case; rather, it is a sworn statement explaining why evidentiary facts cannot yet be presented. *Beckers v. International Snowmobile Indus. Ass'n.* 581 F.2d 1308, 1311 (8th Cir. 1978), *cert. denied*, 440 U.S. 986 (1979). Plaintiff has not submitted a Rule 56(f) affidavit.

The principal purpose of Rule 56(f) is to guard against an improvident or premature grant of summary judgment, and the rule has been liberally applied toward this objective. *See, e.g., S.E.C. v. Spence & Green Chem. Co.*, 612 F.2d 896, 900-01 (5th Cir. 1980), *cert. denied*, 449 U.S. 1082 (1981). Nothing this court has decided today is inconsistent with that overriding goal. Summary judgment is neither granted nor denied at this time; instead, the court is simply insisting upon adherence to a process that was established primarily to protect the non-movant's interests.

Indeed, there is some support for the view that, if the non-movant fails to present affidavits under either Rule 56 (e) or (f), the court may accept the facts alleged in the movant's affidavit as true. And if these facts constitute sufficient basis for summary judgment, the court may grant the motion. *See, e.g., Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 161 (1970) (dictum). There is precedent in our circuit that supports this notion. *See Strang v.*

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[4] Rule 56(f) represents a special case of the more general Rule 56(e) provisions quoted below.

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

U.S. Arms Control & Disarmament Agency, 864 F.2d 859, 861 (D.C. Cir. 1989). In this instance, the court will not impose such a draconian remedy for plaintiff's procedural misstep.

Fourth, as defendants properly note, Rule 56(f) is the vehicle designed to untangle requests for additional discovery on collateral issues from those that are likely to affect the outcome of dispositive motions. Several of the grounds advanced by defendants in support of summary judgment have no obvious connection to the discovery defects raised by the plaintiff. For example, defendants argue for dismissal of the antitrust claims for lack of the multiplicity of actors necessary for a conspiracy. Defendants argue that Title VII is inapposite because plaintiff was never an employee of the hospital. These claims will not be resolved differently by disclosure of financial data nor by definitions of relevant markets. If defendants are entitled to judgment as a matter of law on any of the grounds presented, discovery disputes become moot as to that count. The court will not compel irrelevant discovery when further factual development would not address the dispositive issue. *See, e.g. DeVargas v Mason & Hanger-Silas Mason Co.*, 911 F.2d 1377, 1393 (10th Cir. 1990), *cert. denied*, 498 U.S. 1074 (1991); *United States v. 225 Cartons, More or Less, of an Article or Drug*, 871 F.2d 409, 420 (3rd Cir. 1989).

Plaintiff's opposition(s) to the summary judgment motion(s), due within 30 days of this date, must meet a dual burden. First, plaintiff must respond on the merits to those issues where there is no material factual dispute and defendants would otherwise prevail as a matter of law. Second, plaintiff must identify facts in genuine dispute that will influence the resolution of dispositive issues raised by the defendants. If inadequate discovery prevents an identification of disputed facts, plaintiff may substitute a Rule 56(f) affidavit. The affidavit should indicate what specific information has been withheld, the disputed issue impacted, and its relevance to a particular argument made by defendants in their motion for summary

judgment.

SO ORDERED.

/s/

Royce C. Lamberth
United States District Judge

DATE: January 27, 1995

APPENDIX K

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Harold D. Johnson, M.D.,
Plaintiff,

v.

Civil Action No. 90-1992
(GHR)

Greater Southeast Community
Hospital Corporation, *et al.*,
Defendants.

ORDER

Before the Court are numerous motions by both parties pertaining to discovery disputes: (1) defendants' motion to strike as untimely plaintiff's fourth set of interrogatories and plaintiff's third request for production of documents; (2) plaintiff's motion to compel responses to plaintiffs fourth set of interrogatories and plaintiff's third request for production of documents, and to extend discovery; (3) defendants' motion for a protective order quashing a notice of deposition and subpoena duces tecum served on Alex. Brown & Sons, Inc.; (4) plaintiff's request for sanctions; and (5) defendant's motion for an extension of time to respond to discovery.[1]

On April 14, 1992, the Court issued a Scheduling Order that would have brought this case to the point of oral argument on dispositive motions by the end of 1992. Due to numerous and contentious discovery disputes, that schedule had to be aban-

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[1] The Court also is in receipt of defendant Mahmood Mohamadi's motion for summary judgment, which is ripe for decision and under advisement.

doned three months later. On July 29, 1992, following a status hearing, the Court issued a new Scheduling Order that incorporated some compromises reached between the parties at the status hearing and reset this case for oral argument on dispositive motions in April 1993. Once again, however, the parties are embroiled in discovery disputes.

In the briefs submitted on these various motions, each party claims to have met its discovery burdens and alleges a failure thereof on the part of the other. Each seeks vindication by the Court of its performance during the discovery stages of this case. The Court denies that satisfaction to either side. Instead, the parties are admonished to deal in good faith with each other on matters of discovery. Defendants are reminded that "they have a duty to provide true, explicit, responsive, complete and candid answers to interrogatories," *Chubb Integrated Sys. Ltd,, v. National Bank of Washington*, 103 F.R.D. 52, 61 (D.D.C. 1984). On the same level, plaintiff is not entitled to unending or unduly burdensome discovery, Fed. R. Civ. P. 26(b)(1), and defendants make an increasingly persuasive argument that plaintiff has had "ample opportunity" for discovery. *Id.*

Without setting forth the myriad allegations underlying the several motions, the Court notes that, with the exception of defendants' motion for a protective order, the motions concern or derive from discovery deadlines rather than the substance of discovery requests and responses. Accordingly, the Court will set a new discovery schedule and, for now, leave to the parties the burden of resolving their disputes over the substance of any discovery requests or responses.

The Court rules on the various motions as follows:
Defendants' motion to strike as untimely plaintiff's fourth set of interrogatories and plaintiff's third request for production of documents is DENIED. Plaintiff's motion to compel responses to plaintiffs fourth set of interrogatories and plaintiffs third request for production of documents, and to extend discovery is GRANTED IN PART and DENIED IN PART in accordance

with the following schedule. Plaintiffis request for sanctions is DENIED. And defendants motion for an extension of time to respond to discovery is GRANTED.

The Court's Scheduling Order of July 29, 1992 is VACATED and replaced by the following schedule:

Defendants shall respond on or before December 21, 1992 to Plaintiff's Second Request for Production of Documents to Defendants Greater Southeast Community Hospital and the Individual Defendants and Plaintiff's Third Set of Interrogatories Propounded to Defendant Greater Southeast Community Hospital. Defendants shall respond on or before January 11, 1993 to Plaintiff's Third Request for Production of Documents to Defendant Greater Southeast Community Hospital and the Individual Medical Defendants and Plaintiff's Fourth Set of Interrogatories Propounded to Defendant Greater Southeast Community Hospital.

All discovery except for the taking of depositions of expert witnesses shall close on February 1, 1993. Plaintiff's Rule 26(b)(4) statements shall be filed on or before March 1, 1993, and defendants shall depose plaintiff's experts by April 1, 1993. Defendants' Rule 26(b)(4) statements shall be filed on or before April 1, 1993, and plaintiff shall depose defendants' experts by April 30, 1993.

Dispositive motions shall be filed on or before May 14, 1993, and oral argument on dispositive motions shall take place at 9:00 a.m. on June 3, 1993.

As a final matter, the Court turns to defendants' motion for a protective order quashing the notice of deposition and subpoena duces tecum served upon Alex. Brown & Sons, Inc. Plaintiff wishes to depose and obtain documents from Alex. Brown regarding "financial information about the defendant hospital and its parent corporation." Suppl. Memo. in Support of Pl. Second Mot. to Compel Disc. and Request for the Imposition of Sanctions at 2. The information sought from Alex. Brown is largely duplicative of information sought directly from

defendants in plaintiff's fourth set of interrogatories and third request for production of documents. Seeking this information from Alex. Brown would put that nonparty to undue expense and hardship and would interfere with the contractual relationship between defendants and Alex. Brown. The Court finds that the information plaintiff seeks from Alex. Brown is "obtainable from some other source that is more convenient, less burdensome, [and] less expensive." Fed. R. Civ. P. 26(b)(1)(i). Accordingly, defendants' motion for a protective order is GRANTED. Plaintiff's notice of deposition and subpoena duces tecum served on Alex. Brown & Sons, Inc. is QUASHED.

SO ORDERED.

/s/
George H. Revercomb
United States District Judge

December 9, 1992

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Supreme Court, U.S.
FILED
MAY 20 1997
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No. 96-1748

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

HAROLD D. JOHNSON, M.D.,

Petitioner,

V.

GREATER SOUTHEAST COMMUNITY HOSPITAL CORPORATION, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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PARTIES

The parent corporation of respondent Greater Southeast Hospital Corporation is The Greater Southeast Community Hospital Foundation, Inc., a non-profit corporation organized under the laws of the District of Columbia. Respondent hospital has no subsidiaries.

The parties to the case are otherwise correctly identified in the petition, although undersigned counsel do not represent defendant Kurt Darr and, therefore, take no position as to whether he is a respondent.

All respondents otherwise join in this brief in opposition, except Mary Lou Mayers, deceased, for whom a Suggestion of Death was filed in the district court, but for whom no substitution of party was sought by petitioner.

RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny the petition for certiorari seeking to review the opinion of the United States Court of Appeals for the District of Columbia Circuit.

STATEMENT OF THE CASE

Petitioner's Statement ignores every fact and development which is not favorable to him, and there are many. The district court's opinions of June 24, 1996, and October 19, 1995, provide an accurate statement of the proceedings. App. 7a-62a. For example, after reciting the principal evidence of the respondent hospital's peer review activity regarding petitioner, the district court, in its June 24, 1996 opinion, found:

> In light of the above, it can hardly be maintained that both the two peer review actions and the related peer review activity were motivated by anything other than a 'reasonable belief that the action was in furtherance of quality health care.' 42 U.S.C. § 11112(a)(1).

App. 20a.

The district court also made a well justified finding that petitioner had improperly failed to oppose some of respondents' motions for summary judgment for over two years, despite express orders for him to do so, and that, as a result, those motions were conceded under U.S. District Court For D.C. Local Rule 108(b). App. 25a-26a; 43a-46a.

On October 9, 1996, the court of appeals granted summary affirmance of the judgment of the district court stating: "The merits of the parties' positions are so clear as to warrant summary action." App. 1a.[1/] On January 31, 1997, the court of appeals denied petitioner's petition for rehearing and suggestion for rehearing *in banc*.[2/]

REASONS FOR DENYING THE WRIT

I. THE SOLE QUESTION PRESENTED FOR REVIEW WAS NOT RAISED BELOW

The sole question presented by petitioner for this Court's consideration is whether "[t]he Health Care Quality Improvement Act of 1986, 42 U.S.C. §§ 11101-11152, alters the burden of proof established in Rule 301 of the Federal Rules of Evidence, as interpreted by this Court in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993)." (Petition at i.)

[1/] Petitioner's appeal of the district court's award of attorneys' fees to defendant Kurt Darr has not yet been resolved by the court of appeals and remains pending in that court. App. 2a. Dr. Darr was the hearing officer for the respondent hospital's internal hearing.

[2/] There are several affirmative misstatements in the petition for certiorari including, among others, the following:

- Petitioner's difficulties did not arise merely out of a concern that he had "a bad attitude." (Petition at 6.) There were significant issues regarding the quality of patient care which were in dispute, as set forth in the district court's June 24, 1996 opinion. App. 17a-20a.

- Respondents never contended that they were "immune" under the Health Care Quality Improvement Act from federal civil rights suits. (Petition at 9 and n. 21.)

Despite the pendency of this case for nearly seven years, petitioner never raised this issue in either the district court or the court of appeals. Petitioner never even cited Rule 301 in any brief filed in this case before filing the petition for certiorari. Respondents have never raised this issue. Nor has either the district court or the court of appeals addressed this issue in any of the opinions rendered in this case.

This Court ordinarily declines to review issues that were not raised in the courts below, and petitioner has presented no basis whatever for an exception to that rule. *City of Springfield, Mass. v. Kibbe*, 480 U.S. 257, *reh. denied*, 481 U.S. 1033, (1987).

II. RESPONDENTS WERE ALSO HELD TO BE ENTITLED TO SUMMARY JUDGMENT ON GROUNDS UNRELATED TO HCQIA IMMUNITY AS A RESULT OF PETITIONER'S FAILURE TO FILE TIMELY RESPONSES

As set forth in the June 24, 1996, and October 19, 1995, opinions of the district court, and as stated above, respondents moved for summary judgment on multiple separate grounds. The immunity provided by the Health Care Quality Improvement Act (HCQIA) was just one of those grounds. The district court held that even if respondents were not entitled to summary judgment under HCQIA, they were entitled to summary judgment on the other, additional grounds set forth in their summary judgment motions which petitioner had failed to oppose for over two years despite express orders from the court that a response was due on a date certain. App. 25a-26a; 43a-46a.

Therefore, even if the district court and the court of appeals erred in granting summary judgment to respondents under HCQIA, respondents nevertheless were entitled to prevail on other grounds.

CONCLUSION

The writ of certiorari should be denied.

Respectfully submitted,

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(4)

No. 96-1748

In the Supreme Court of the United States

OCTOBER TERM, 1996

HAROLD D. JOHNSON, M.D.,
PETITIONER,

v.

GREATER SOUTHEAST COMMUNITY HOSPITAL
CORPORATION, *et al.*,
RESPONDENTS.

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

1. Respondents erroneously assert (Br. in Opp. 3) that the question presented in this case was not raised below. As we detail in the petition, Dr. Johnson filed volumes of evidence opposing the hospital's motion for summary determination of its right to immunity under the HCQIA that he asked the lower courts to consider. *See* Pet. 6-10. Because the lower courts' unexplained refusal to review that evidence conflicts with the precedent of this Court on the role of a court in evaluating the evidence before it under Rule 301, FED. R. EVID., and grants hospitals the right to absolute immunity under the HCQIA, the question presented has substantial, recurring, importance.

Unaware that the district court would not even review the evidence he filed to rebut the statutory presumption of reasonable action, Dr. Johnson, admittedly did not cite Rule 301 in that court. Rather, Dr. Johnson filed 114 exhibits with the district court in opposition to the hospital's 1993-motion for summary judgment on grounds of immunity under the HCQIA. Dr. Johnson argued that his evidence was sufficient to overcome the presumption of reasonable hospital action so as to preclude the grant of summary judgment to the hospital. *Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment on Grounds of Immunity Under the Health Care Quality Improvement Act* at 40-54.

On appeal, Dr. Johnson stated the issue as the district court's failure to review his evidence and noted that the appellate standard of review for a grant of summary judgment is *de novo*. Dr. Johnson argued that the job of the district court, at the summary judgment stage, was to consider his evidence and determine from it whether a jury could conclude that the hospital was not entitled to immunity under the HCQIA. *Supplemental Memorandum in Support of Appellant's Motion for Expedited Consideration of Appeal and for Summary Reversal* at 10-17; *Memorandum in Opposition to Appellee's Cross-Motion for*

Summary Affirmance and in Further Support of Appellant's Motion for Summary Reversal at 5-6.

Following its summary affirmance of the grant of summary judgment, Dr. Johnson asked the court of appeals to determine, *in banc*, whether a federal court is

> obligated to review all of the testimonial and documentary evidence submitted by the parties, against their relative burdens of proof, before summarily determining that a hospital is . . . entitled to immunity from damages under the Health Care Quality Improvement Act,

pursuant to the *de novo* standard of review. *Petition for Rehearing and Suggestion for Rehearing In Banc* at 1, 3. For purposes of review by this Court, the issue now before it was both pressed by Dr. Johnson and passed upon by the court of appeals in its order summarily affirming the grant of summary judgment "substantially for the reasons stated by the district court." App. 1a. Review of the question presented here is appropriate. *See, e.g., United States v. Williams*, 504 U.S. 36, 40-43 (1992) (holding that even review of an issue not pressed by the petitioner below is permitted so long as it has been passed upon).

2. The petition also should be granted because, as we discuss in the petition, the decision below conflicts with the well-established role of a court in deciding a motion for summary judgment. We illustrate in the petition (Pet. 6-11) the volume of evidence the lower courts ignored in this case. As it must, the hospital here concedes (Br. in Opp. 2, n. 2) that "[t]here were significant issues regarding the quality of patient care which were in dispute." The decision below thus is in direct conflict with the Tenth Circuit's holding -- recently left standing by this Court -- that expert testimony on behalf of a physician who alleges misuse of the hospital peer review process creates a

triable issue of fact on the reasonableness of a hospital's action. *Brown v. Presbyterian Healthcare Serv.*, 101 F.3d 1324, 1333 (10th Cir. 1996), *cert. denied*, 65 U.S.L.W. 3689 (Apr. 15, 1997).

Moreover, this Court recently held that not even a sitting President of the United States is entitled to absolute immunity from suit where a private party seeks damages arising from his unofficial actions. *Clinton v. Jones*, 1997 U.S. LEXIS 3254 (May 27, 1997). This Court also has rejected claims that physician peer reviewers are entitled to state-action immunity in antitrust proceedings. *Patrick v. Burget*, 486 U.S. 94 (1988). Likewise, this Court has let stand decisions of the Sixth and Ninth Circuits directly holding that the HCQIA establishes only a qualified right to immunity from damages, not an absolute right to immunity from suit. *Decker v. IHC Hosps., Inc.*, 982 F.2d 433 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 3041 (1993); *Manion v. Lima Mem. Hosp.*, 986 F.2d 1036 (6th Cir. 1992), *cert. denied*, 114 S. Ct. 71 (1993). Thus, no court has granted any private litigant the type of absolute immunity afforded the respondents in this case.

3. Respondents also claim that the petition should be denied because they are entitled to prevail on other, unspecified, grounds since Dr. Johnson allegedly failed to respond to their additional dispositive motions (Br. in Opp. 3-4). Presumably, the hospital means that it is entitled to summary judgment on the substantive antitrust claims as well.[1] That claim is unfounded for, as we note in the petition (Pet. 21), a grant of summary judgment is appropriate only after adequate discovery has been had by the non-moving party. *See, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Since the district court repeatedly refused to grant Dr. Johnson's motions to compel discovery prior

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[1] The question of immunity under the HCQIA is relevant only to the issue of substantive antitrust liability.

to holding that he had conceded the hospital's 1993-dispositive motion on the issue of antitrust liability (App. 87a, 90a-91a, 96a), and Dr. Johnson had opposed its 1990-dispositive motion on the same issue in November 1990,[2] the district court's alternative holding is at once premature and incompatible with its established task at the summary judgment stage.

The district court also abused its discretion when it ignored Dr. Johnson's June 1995-request for an enlargement of time in which to respond further to the substantive antitrust claims -- in light of its refusal to permit discovery -- contemporaneously with the June 1996-decision of default. *See* App. 26a-27a. That abuse of discretion is made all the more clear by the district court's later denial of the hospital's request for attorney's fees noting that Dr. Johnson had "vigorously prosecuted this case." App. 84a. Dr. Johnson obviously could not have prosecuted vigorously a case in which he also defaulted. The alternative holding of the district court is no basis upon which to deny review of the important question presented in this case.

CONCLUSION

For the reasons stated above, and in the petition, the

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[2] *See* Pet. 10 and n. 23.

petition for a writ of certiorari should be granted.

Respectfully submitted.

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